(25,132)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 379.

SECUNDINO OMAECHEVARRIA, PLAINTIFF IN ERROR,

vs.

STATE OF IDAHO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 4, 1916.

In the Supreme Court of the State of Idaho, January Term, 1915.

No. 2659.

STATE OF IDAHO, Respondent,
vs.
SECUNDINO OMAECHEVVIARIA, Appellant.

Appeal from the Third Judicial District of the State of Idaho in and for the County of Owyhee.

TRANSCRIPT ON APPEAL.

Oppenheim & Hodgin, Perky & Crow, Attorneys for Appellant. J. H. Peterson, Attorney General; T. C. Coffin, Assistant Attorney General; William Healy, Attorneys for Respondent.

Endorsed: Filed June 4", 1915. I. W. Hart, Clerk, by E. G. David, Deputy.

1 In the Probate Court of the County of Owyhee, State of Idaho.

Criminal.

STATE OF IDAHO, Respondent,
vs.
JOHN DOE, Real Name Unknown, Defendant.

Complaint.

STATE OF IDAHO,
County of Owyhee, ss:

Personally appeared before me this 22nd day of August, A. D. 1914, George Swisher, who, being duly sworn, does on oath make complaint and deposes and says: that on or about the 15th day of August, 1914, at the County of Owyhee, State of Idaho, the crime of misdemeanor was committed, towit: by John Doe, whose real name is unknown to this affiant, who then and there having in his charge and under his control a band of sheep to the number of about two thousand, did wilfully and unlawfully herd, graze and pasture said sheep upon a cattle range previously occupied by cattle, and usually occupied by certain cattle growers, towit: Stauffer & Stauffer, W. D. Winters, Lowry Brothers, James Swisher, Swisher & Sons, Ben Mills, Swisher & Somerville, E. F. Brace, Pete McDonald, and Charles Maher, as a spring, summer and winter range for their cattle, which said range is usually and customarily used as a cattle

range, towit: that certain cattle range situate in said Owyhee County, State of Idaho, and described as follows: Beginning at a point where the North Fork of the Owyhee River crosses the Idaho-Oregon state line, thence up said North Fork in an easterly direc-
2 tion five miles, thence in a southerly direction to a point where the Pleasant Valley road crosses Three Mile Creek, thence up said Three Mile Creek in a southerly direction to a point where the said Three Mile Creek is crossed by the Rickard wagon road, thence in an easterly direction along said road to Smith Creek, thence down Smith Creek to Nickle Creek, thence down Nickle Creek to Deep Creek, thence down Deep Creek in a southerly direction to the South Fork of the Owyhee River, thence in a northwesterly direction down said South Fork to the Idaho-Oregon state line, and thence north along said line to the place of beginning, contrary to the form, force and effect of the statute in such cases made and provided and against the peace and dignity of the State of Idaho.

Wherefore complainant prays that a warrant be issued for the arrest of the said John Doe, real name unknown, and that he be brought before this court and dealt with according to law.

(Signed) GEO. M. SWISHER.

Subscribed and sworn to before me this 22nd day of August, 1914.

[SEAL.] (Signed) R. H. LEONARD,
Probate Judge.

Filed Sept. 19, 1914. J. S. St. Clair, Clerk.

Complaint.

Criminal.

(Title of Court and Cause.)

STATE OF IDAHO,
County of Owyhee, ss:

Personally appeared before me this 22nd day of August, A. D. 1914, George Swisher, who, being duly sworn, does on oath make complaint and deposes and says: that on or about the 15th
3 day of August, 1914, at the County of Owyee, State of Idaho, the crime of misdemeanor was committed, towit: by Secundino Omaechevviaria, who then and there having in his charge and under his control a band of sheep to the number of about two thousand, did wilfully and unlawfully herd, graze and pasture said sheep upon a cattle range previously occupied by cattle, and usually occupied by certain cattle growers, towit: Stauffer & Stauffer, W. D. Winters, Lowry Brothers, James Swisher, Swisher & Sons, Ben Mills, Swisher & Somerville, E. F. Brace, Pete McDonald and Charles Maher, as a spring, summer and winter range for their

cattle, which said range is usually and customarily used as a cattle range, towit: that certain cattle range situate in said Owyhee County, State of Idaho, and described as follows: Beginning at a point where the North Fork of the Owyhee River crosses the Idaho Oregon State line, thence up said North Fork in an easterly direction five miles, thence in a southerly direction to a point where the Pleasant Valley road crosses Three Mile Creek, thence up said Three Mile Creek in a southerly direction to a point where the said Three Mile Creek is crossed by the Rickard wagon road, thence in an easterly direction along said road to Smith Creek, thence down Smith Creek to Nickle Creek, thence down Nickle Creek to Deep Creek, thence down Deep Creek in a southerly direction to the South Fork of the Owyhee River, thence in a northwesterly direction down said South Fork to the Idaho-Oregon state line, and thence north along said line to the place of beginning, contrary to the form, force and effect of the statute in such cases made and provided and against the peace and dignity of the State of Idaho.

Wherefore complainant prays that a warrant be issued for the arrest of the said Secundino Omaechevviaria, and that he
4 be brought before this court and dealt with according to law.

(Signed) GEO. M. SWISHER.

Subscribed and sworn to before me this 3rd day of Sept. A. D., 1914.

[SEAL.] (Signed) R. H. LEONARD,
Probate Judge.

Filed Sept. 19, 1914. J. S. St. Clair, Clerk.

Judgment.

(Title of Court and Cause.)

A complaint, under oath, having been filed in this court on the 22nd day of August, 1914, charging said defendant, Secundino Omaechevviaria of certain public offences, to-wit: herding, grazing and pasturing sheep on a cattle range, usually occupied as a cattle range by certain cattle growers, a misdemeanor, committed on the 15th day of August, 1914, and a warrant of arrest having been duly issued for the arrest of said defendant, and said defendant having been duly arrested, and thereafter, on the 3rd day of September, 1914, tried before this court, without a jury, a jury trial having been waived, as provided by law in such cases, and by the court found guilty, as charged in the complaint; and all and singular, the law and the premises being by the court here understood and fully considered, and no sufficient cause appearing to the court why judgment should not be pronounced against said Secundino Omaechevviaria.

Wherefore, it is by the court here ordered and adjudged that for said offense, you, the said Secundino Omaechevviaria do pay a fine in the sum of One Hundred Fifty Dollars and the
5 costs incurred in said action amounting to the sum of $49.45, and be imprisoned in the county jail of said Owyhee County, until the said fine and costs be paid, not exceeding one hundred days. Done in open court this 3rd day of September, A. D. 1914.

(Signed) R. H. LEONARD,
Probate Judge.

Filed Sept. 19, 1914. J. S. St. Clair, Clerk.

Notice of Appeal.

(Title of Court and Cause.)

Please take notice that the defendant, Secundino Omaechevviaria, hereby appeals to the District Court of the Third Judicial District of the State of Idaho, in and for the County of Owyhee, from the judgment of conviction, heretofore, towit, on the 3d day of September, 1914, rendered against him in the said Probate Court of the State of Idaho in and for the County of Owyhee, adjudging him *b*uilty of the crime of misdemeanor, in that he grazed sheep on a cattle range, in violation of Sec. 6872 R. C. Idaho; and from the whole of said judgment. This appeal is taken upon questions both of law and of fact.

Dated Sept. 8th, 1914.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

Residence, Boise, Idaho.

To C. E. Melvin, Esq., Prosecuting Attorney for Owyhee County, Attorney for the State of Idaho in the said cause.

Service of above notice accepted this 9th day of September, 1914.

(Signed) C. E. MELVIN,
County Att'y.

Filed Sept. 19, 1914. J. S. St. Clair, Clerk.

6 *Bail Bond.*

(Title of Court and Cause.)

The above defendant having given notice of his intention to appeal to the District Court of the Third Judicial District of the State of Idaho, in and for the County of Owyhee, from the Judgment of conviction, heretofore, towit, on the day of September, 1914, rendered against him in the said Probate Court of the State of

Idaho in and for the County of Owyhee, adjudging him guilty of the crime of misdemeanor, in that he grazed sheep on a cattle range, in violation of Sec. 6872 R. C. Idaho; and the said defendant desiring to be released from custody during the pending of the said appeal and desiring a stay of execution under the said judgment until the said appeal is disposed of, and his bail having by order of the above entitled court been fixed at Three Hundred Dollars ($300):

Now, therefore, We, O. D. Brumbaugh and C. M. Caldwell, hereby undertake that the above named defendant will faithfully prosecute the said appeal and render himself in execution of any judgment or order entered against him in the said District Court, and will pay any judgment, fine and costs that may be awarded against him on the appeal; or, if he fails to perform either or any of these conditions, that we will pay to the State of Idaho the sum of Three Hundred Dollars ($300).

Dated September 3, 1914.

(Signed) O. D. BRUMBAUGH. [SEAL.]
(Signed) C. M. CALDWELL. [SEAL.]

Approved by me this 3rd day of September, 1914.

(Signed) R. H. LEONARD,
Probate Judge.

Filed Sept. 19, 1914. J. S. St. Clair, Clerk.

7 In the District Court of the Third Judicial District of the State of Idaho in and for the County of Owyhee.

STATE OF IDAHO, Plaintiff,
vs.
SECUNDINO OMAECHEVVIARIA, Defendant.

Demurrer.

Comes now the defendant, Secundino Omaechevviaria, and demurs to the complaint heretofore filed against him in the above entitled action in said court, and as grounds of demurrer states:

1.

That the facts stated in said complaint do not constitute a public offense.

2.

That it appears upon the face of said complaint that it does not substantially conform to the requirements of Sections 7677, 7678 and 7679 of the Revised Codes of the State of Idaho, and particularly in this:

(1) That the acts constituting the alleged offense are not stated in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended.

(2) That said complaint is not direct and certain as regards:
(a) The offense charged.
(b) The particular circumstances of the offense charged.
8 (3) That it does not appear from said complaint, when or how or by whom, if at all, the exterior boundaries of the alleged cattle range were determined, marked out of established, or that the same were determined, marked out or established at the time of the alleged offense.

(4) That it does not appear from said complaint that the boundaries of the alleged cattle range were marked out on the ground at the time of the alleged offense, so as to give notice of the limits thereof, and especially to this defendant.

(5) That it does not appear from said complaint that the limits of said range were definitely and certainly fixed or well established or generally known.

(6) That it does not appear upon what part of said range the defendant is alleged to have herded, grazed or pastured sheep, etc.

(7) That it does not appear from said complaint that the alleged cattle range was owned or claimed by the alleged cattle growers by priority of possessory right, nor by what possessory right, if any, such cattle growers owned or claimed said range.

(8) That it does not appear from said complaint whether the alleged cattle range is public lands of the United States or consists of lands owned by the State of Idaho or by private individuals.

(9) That it is not alleged that the defendant was not entitled to use the said range referred to by priority of possessory right.

(10) That it does not appear from said complaint that the said range had, prior to the alleged offense been continuously and exclusively used and occupied for a long period of time by
9 permanently established cattle growers for the pasturage of sufficient cattle to reasonably use all of the said range, and that during said time sheep had been excluded therefrom and had not grazed thereon.

(11) That it is nowhere charged in or made to appear by said complaint that this defendant at the time of the alleged offense knew of the existence of the said alleged cattle range, as described in said complaint.

(12) That it does not appear that the defendant knowingly committed the alleged offense.

3.

That section 6872 of the Revised Codes of the State of Idaho, under which said complaint is brought and the violation of which the defendant is herewith charged, is null and void, for the following reasons, towit:

First, it is in contravention of Section 1 of Article 1 of the Constitution of the State of Idaho in that it deprives the defendant of the right of acquiring, possessing and protecting his property and of the equal protection of the law.

Second, it is in contravention of the fourteenth amendment of the Constitution of the United States in that it deprives the defend-

ant of property without due process of law; in that it denies the defendant the equal protection of the law and abridges the privileges and immunities of citizens and especially of this defendant, and in that the same is class legislation.

Third, it is in contravention of the laws of the United States of America in that it contravenes the Act of Congress of February 25th, 1885, (23 U. S. Statutes at large, page 321) in this: that said Act declares the assertion to the right to the exclusive possession and occupancy of any part of the lands of the United States without claim, color of title or asserted right as therein specified to be unlawful.

(Signed.) OPPENHEIM & HODGIN,
Residence, Boise, Idaho,
Attorneys for Defendant.

Filed Sept. 26, 1914. J. S. St. Clair, Clerk.

10 *Minutes of the Court.*

SILVER CITY, IDAHO, Saturday, September 26th, 1914.

Fourth Judicial Day of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Owyhee.

Court met pursuant to recess at ten o'clock A. M.

Present: Hon. Carl A. Davis, and the officers of the Court.

The following proceedings were had, towit:

Criminal, No. 23. Misdemeanor.

STATE OF IDAHO
vs.
SECUNDINO OMAECHEVVIARIA.

Appeal from Probate Court.

Whereupon, upon motion of Shad L. Hodgin, Esq., of counsel for defendant, and with the consent of the Prosecuting Attorney.

It is ordered that the bail bond heretofore filed in this cause on behalf of the defendant, with O. D. Brumbaugh and C. M. Caldwell, as sureties thereon, be withdrawn, and that the bail bond this day duly offered, with H. S. Bettis and Sam Ballantyne as sureties thereon be submitted therefor.

Whereupon, upon motion of C. E. Melvin, Esq., Prosecuting Attorney.

It is ordered that the name of William Healy, Esq., be entered as associate counsel on behalf of the State in the trial of this cause.

11 On this day this cause came on regularly for trial before the Court and jury, C. E. Melvin, Esq., Prosecuting Attorney, and William Healy, Esq., appearing on behalf of the State, and Shad L. Hodgin, Esq., of Oppenheim & Hodgin, as counsel for the defendant.

Upon motion of counsel for the defendant,

It is ordered that leave be granted the defendant to file a demurrer to the complaint heretofore filed against said defendant, which demurrer was thereupon duly submitted, and thereupon overruled by the Court.

The Clerk thereupon proceeded to call a jury to try said cause, on unsealing the jury-box, and drawing therefrom the names of the following jurors, to-wit: A. T. Evans and Geo. P. Jess, who were sworn and examined on their voir dire, were challenged peremptorily by counsel for the prosecution and were thereupon by the Court excluded from the consideration of this cause.

And the following named jurors, drawn from said box to serve as jurors in said cause, and who were sworn and examined on their voir dire, were challenged peremptorily by counsel for the defendant, to-wit: John Nelson and D. H. Johnson, and were thereupon by the Court excluded from the consideration of this cause.

And the following named persons drawn from said box to serve as jurors in said cause, to-wit: T. A. Foreman, F. H. Scott, George Ulrich, L. R. Stanford, J. E. Neiss, R. M. Pritchard, J. S. Stevenson, J. H. Munger, W. H. Adams, Ted Mickey, Al Purcell and John Lee, were sworn and examined on their poir dire, and duly accepted to try the case by counsel for the State and defendant, respectively.

Said jurors were duly sworn by the Clerk to well and truly try said cause, and a true verdict render therein according to the law and the evidence.

12 The Clerk, then, under the direction of the Court, read the complaint on file in this cause to the jury, and stated the plea of the defendant thereto.

William Healy, Esq., of counsel for the prosecution, thereupon made the opening statement of the case to the jury on behalf of the State, and called the following named witnesses, to-wit: George M. Swisher, Joseph Newell, Harry Wilson, W. S. Maher, Glen Wolcott and William P. Hicks, who were duly sworn and testified on behalf of the State, and were cross-examined by counsel for the defendant.

And the State here rests.

Counsel for the defendant thereupon waived his opening statement of the case to the jury on behalf of the defense, and called the following named witnesses, to-wit: R. F. Bicknell, J. W. Starkey and W. D. Evans, who were sworn and testified on behalf of the defendant, and were cross-examined by counsel for the prosecution.

And the defendant here rests.

Thereupon, the following named witness, to-wit: E. A. STAUFFER, was called in rebuttal, was sworn, and duly testified on behalf of the prosecution and was cross-examined by counsel for the defendant.

And the prosecution here rests.

And the defense here rests.

The Prosecuting Attorney thereupon opened the argument to the jury on behalf of the prosecution, and was followed by Shad L. Hodgin, Esq., on behalf of the defendant, who was followed by

William Healy, Esq., who concluded the argument on behalf of the State and the argument here closed.

13 The Court then admonished the jury and adjourned the further hearing of this cause until Monday, the 28th inst., at nine o'clock A. M.

SILVER CITY, IDAHO, Monday, September 28th, 1914.

Criminal, No. 23. Misdemeanor.

STATE OF IDAHO
vs.
SECUNDINO OMAECHEVVIARIA.

Appeal from Probate Court.

Upon the opening of Court at nine o'clock A. M. the jury was called, and all found present, the respective attorneys of record being also present in Court.

Thereupon, the jury, after having been instructed by the Court in writing, retired to their room to consider of their verdict, in charge of C. D. Hedum, an officer of the court, who was first duly sworn.

Now comes the jury, all called and found present, counsel of record being also present in Court.

The jury, being asked by the Court, if they had agreed upon a verdict, they, through their foreman, presented their written verdict, as follows:

"In the District Court of the Third Judicial District of Idaho in and for the County of Owyhee.

Criminal, No. 23.

THE STATE OF IDAHO, Plaintiff,
vs.
SECUNDINO OMAECHEVVIARIA, Defendant.

Verdict.

We, the jury in the above entitled cause, find the defendant guilty as charged in the complaint.

T. A. FOREMAN, *Foreman.*"

14 Which verdict was filed by the Clerk, recorded in full, and read to the jury, who confirmed the same.

Whereupon, the Court discharged the jury from the further consideration of this case, and excused them from further attendance on the Court, until Tuesday, the 29th inst., at 9 o'clock A. M.

Whereupon, the defendant, by his counsel, Shad L. Hodgin, Esq.,

having requested the Court to impose judgment upon said defendant forthwith;

And no legal cause being shown why judgment should not be pronounced against said defendant;

Thereupon, the Court rendered its judgment as follows:

It is the judgment of the Court that the defendant in this cause is guilty of the crime of Misdemeanor committed on or about the 15th day of August, 1914, at the County of Owyhee, State of Idaho, said defendant then and there having in his charge and under his control a band of sheep to the number of about two thousand, which said defendant did wilfully and unlawfully graze and pasture upon a certain cattle range, described in the complaint on file in this action, previously occupied by cattle, and usually occupied by certain cattle growers, named in the complaint, as a spring, summer and winter range for their cattle, which said range was usually and customarily used as a cattle range, and that he be punished by the payment of a fine of $150.00 together with the costs of this prosecution, taxed at the sum of $229.15;

And in default of payment thereof, it is further ordered that said defendant be committed to the custody of the Sheriff of Owyhee County, Idaho, to be by such Sheriff imprisoned in the county jail of said Owyhee County, until such fine and costs have been satisfied, at the rate of one day for every two dollars of said fine and costs, not exceeding one hundred ninety days.

Whereupon, a certificate of the Judge of this Court that there is probable cause for an appeal to the Supreme Court of the State of Idaho, by the defendant herein, having been filed with the clerk of this Court,

It is further ordered that the judgment in this cause be stayed, pending said appeal, and that defendant be released from custody during the pendency of said appeal, upon furnishing a bond in the sum of $500.00, to be approved by the Judge of this Court, conditioned that said defendant will faithfully prosecute said appeal and render himself in execution of any judgment or order rendered or entered against him in said Supreme Court, and will pay any judgment, fine and costs that may be awarded against him on the appeal.

CARL A. DAVIS, *Judge.*

Filed Sept. 28, 1914. J. S. St. Clair, Clerk.

Instructions Requested and Refused.

Defendant's Instruction Number One.

The court having determined that Sec. 6872 of the Revised Codes of Idaho, under which this prosecution is brought, contravenes Sec. 1 of the Constitution of the State of Idaho, is unconstitutional and therefore null and void, the jury is instructed to find the defendant not guilty.

Denied as not a correct statement of the law.

(Signed) CARL A. DAVIS, *Judge.*

To the refusal to give this instruction, the defendant excepted.
(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

16 Defendant's Instruction No. Two.

The court having determined that Sec. 8672 of the R. C. of Idaho under which this prosecution is brought, contravenes Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, is unconstitutional and therefore null and void, the jury is instructed to find the defendant not guilty.

Denied as not a correct statement of the law.
(Signed) CARL A. DAVIS, *Judge.*

To the refusal to give this instruction the defendant excepted.
(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

Defendant's Instruction No. Three.

The court having determined that Sec. 6872 of the R. C. of Idaho, under which the prosecution is brought, is in direct conflict with the Act of Congress of February 25th, 1885, Ch. 149, 23d Stat. L. 321 and is therefore null and void, the jury is instructed to find the defendant not guilty.

Denied, as not a correct statement of the law.
(Signed) CARL A. DAVIS, *Judge.*

To the refusal to give this instruction the defendant excepted.
(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

Defendant's Requested Instruction No. Four.

Par. 1. Before you can find the defendant guilty of the offense charged in the complaint, you must be satisfied beyond a rea-
17 sonable doubt of the existence of each and all of the following material facts, to-wit:

First. That the alleged offense was committed within one year prior to the 3rd day of September, 1914, on which last mentioned date the complaint was filed in court.

Second. That the place where the alleged offense was committed is in Owyhee County, State of Idaho.

Given after date added to blank.
(Signed) CARL A. DAVIS, *Judge.*

Third. That the defendant at such time had charge or control of sheep and that he wilfully and unlawfully herded, grazed or pastured the same upon a cattle range described in the complaint.

Given as modified in pencil.
(Signed) CARL A. DAVIS, *Judge.*

To the refusal to give this instruction the defendant duly excepted.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

That the place of the alleged offense is a cattle range, that is to say, a range continuously and exclusively used and occupied for a long period of time by permanently established cattle growers, for the pasturage of sufficient cattle to reasonably use all of such range, the limits of which range are definitely, certainly and well established and generally known, and upon which, during said time sheep have been excluded from pasturage thereon and have not grazed thereon.

Denied in form but given in part otherwise.

(Signed) CARL A. DAVIS, *Judge.*

18 To the refusal to give this instruction the defendant duly excepted.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

That at the time and place of the alleged offense, the defendant knew that the particular locality he was occupying was a cattle range, as herein described, and that he wilfully herded, grazed or pastured sheep thereon, or permitted or suffered the same to be done.

Given in part and denied in present form.

(Signed) CARL A. DAVIS, *Judge.*

To the refusal to give this instruction the defendant duly excepted.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

Defendant's Requested Instruction No. Five.

It is a sufficient defense to the charge herein if you are satisfied that the range upon which the defendant grazed sheep had prior to his entry thereon been used and occupied in the usual and customary manner by both cattle and sheep as a range.

Given as modified in pencil.

(Signed) CARL A. DAVIS, *Judge.*

To the refusal to give this instruction the defendant duly excepted.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

19 Defendant's Requested Instruction No. Six.

Before you can find the defendant guilty of the charge laid in the complaint, you must find that the land upon which he entered and pastured sheep, if you find that he so did, had been previously

occupied and used for pasturage by cattle growers for pasturing cattle, to the exclusion of sheep.

Denied, as not necessary to find that sheep excluded entirely, as a trespass or temporary occupancy would then have effect of changing range from cattle range to sheep range, and law provides that priority of usual and customary use shall determine character of range.

(Signed) CARL A. DAVIS, *Judge.*

To the refusal to give this instruction the defendant duly excepted.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

Defendant's Requested Instruction No. Seven.

Before you can find the defendant guilty of the offense charged, you must find beyond a reasonable doubt that the limits of the alleged cattle range were marked out and established on the ground so plainly as to give notice to other, and particularly to this defendant, or that said limits were certainly and generally known.

Denied, since notice given otherwise than by marks is sufficient and it is the character of use, and not any markings or claim of boundaries that determines what is a cattle range, and any kind of knowledge as to such use as a cattle range suffices as notice to any one in control of sheep not to herd, graze or pasture them thereon. It is not necessary for it to be generally known, if person tres-
20 passing knows it to be a cattle range to justify his conviction.

Some notice or knowledge as to the character of the range is essential, however, to make it an offense for one in control of sheep to take them on a cattle range.

(Signed) CARL A. DAVIS, *Judge.*

To the refusal to give this instruction the defendant duly excepted.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

Defendant's Requested Instruction No. Eight.

Before you can find the defendant guilty of the offense charged, you must find that the alleged range did not consist of vacant public lands of the United States.

Denied, because vacant public lands subject to police regulations of state.

(Signed) CARL A. DAVIS, *Judge.*

To the refusal to give this instruction the defendant duly excepted.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

Defendant's Requested Instruction No. Nine.

Before you can find the defendant guilty of the offense charged, you must find that the cattle growers named in the complaint used and occupied the lands embraced in said range by virtue of title derived thereto from the government of the United States or the State of Idaho, or by virtue of entry thereof under the land laws of the United States, or that said lands were lands owned
21 by the State of Idaho.

Denied, for reason given in reference to No. 8 above.

(Signed) CARL A. DAVIS *Judge.*

To the refusal to give this instruction the defendant duly excepted.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

Defendant's Requested Instruction No. Ten.

If you believe from the evidence that the defendant grazed sheep upon the range in controversy under such circumstances as to induce a reasonable man to believe that he was not trespassing upon a cattle range, then you should find the defendant not guilty.

Denied, but given fully in principle and effect, otherwise.

(Signed) CARL A. DAVIS, *Judge.*

To the refusal to give this instruction the defendant duly excepted.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

Filed Sept. 28, 1914, J. S. St. Clair, Clerk.

Instructions to Jury.

(Title of Court and Cause.)

Gentlemen of the Jury:

This is an action wherein the State of Idaho is plaintiff and Secundino Omaechevviaria is defendant. The action on behalf of the State is based upon a complaint charging the defendant with having herded, grazed and pastured sheep upon a cattle range
22 previously occupied by cattle, as is more particularly alleged in the complaint read to you by the Clerk of this court at the beginning of this trial.

The defendant has heretofore pleaded that he is not guilty of the offense charged in said complaint.

No. 2.

The evidence to be considered in this trial has all been received, and the attorneys in the case have ably and conscientiously repre-

sented their clients, and have diligently advocated the theories and principles intended to aid you in rendering a just verdict. It is now the duty of the Court to instruct you as to the law of the case. And under the statutes of this State it is your duty to accept the law as given by the Court without mental reservation, and to follow that law regardless of your own opinion of what the law is or should be, and regardless also of what the counsel on either side may have stated the law to be, and the jury should accept the law as given by the Court and apply it to the facts as testified to in the evidence. And while it is the province of the Court alone to declare the law, it is alike the province of the jury alone to ascertain the facts established by the evidence in the case. But your personal opinion as to facts not proven by the evidence in this case can not properly be considered as the basis of your verdict. You may surmise that certain conditions existed that were not shown by the evidence, but as jurors you can only act upon the evidence produced on the trial, and from that and that alone you must form your verdict, unaided and uninfluenced by any opinions or presumptions of fact not formed upon the testimony and exhibits admitted for your consideration.

23 And in determining the facts of the case you should not be influenced in your opinion thereof in the least because of any remarks by the Court relative to the evidence made when ruling on points of law, for in no case did the Court intend to indicate or intimate to you what you should find the facts to be. And you should not consider any evidence stricken out, nor any information that you may have received outside of court, as a basis of your verdict.

No. 3.

It is your duty to commence the investigation of this case with the presumption that the defendant is innocent of the offense with which he is charged. This presumption is not an idle form, but is a fundamental and important part of the law, and you should act upon this presumption throughout your consideration of the evidence, unless it shall have been overcome by proof of guilt so strong, creditable and conclusive as to convince your minds beyond any reasonable doubt that the defendant is guilty.

Merely because the defendant has been suspected of the perpetration of the offense charged in the complaint does not tend in any degree to show his guilt or remove from him this presumption of innocence which the law throws about him. That a complaint has been filed against him is not evidence of his guilt. It is a mere accusation, and the jury should not permit themselves to be influenced to any extent whatever against the defendant because of the existence or filing of said complaint.

However, the rule of law which clothes every person accused of a misdemeanor with the presumption of innocence and im-

24 poses upon the State the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid anyone who is in fact guilty to escape, but is a humane provision of law,

intended, as far as human agencies can, to guard against the danger of any innocent person being unjustly punished.

No. 4.

A reasonable doubt is an actual doubt that you are conscious of having after going over in your mind the entire case, giving consideration to each part of the evidence and all of it taken together. If you then feel uncertain and not fully convinced that the defendant is guilty, and that you would be acting in a reasonable manner should you find him guilty, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt of which the defendant is entitled to have the benefit. If, however, after carefully considering all the evidence, you have an abiding conviction of the truth of the charge, then you are satisfied beyond a reasonable doubt, and should render your verdict accordingly.

In a legal sense a reasonable doubt is one which has some reason for its basis; it does not mean a doubt caused by mere caprice or groundless assumption, nor must the jury entertain such doubts as are merely vague or shadowy uncertainties. A doubt produced by undue sensibility in the mind of a juror in view of the possible consequences of his verdict, is not a reasonable doubt, and the jury is not allowed to create sources or materials of doubt by remote conjectures as to possible theories of the case different from those established by the evidence.

25 Your oath imposes on you no obligation to doubt when no doubt would exist if no oath had been administered, and in considering this case the jury are not to go beyond the evidence to hunt up doubts or find a basis for their verdict.

It is not necessary that all the facts or circumstances surrounding the testimony given on behalf of the State shall be established beyond a reasonable doubt. All that is incumbent on the prosecution in order to justify a verdict of guilty is to prove the material facts, as herein explained, beyond a reasonable doubt, and that all the facts and circumstances in evidence taken together, establish defendant's guilt beyond a reasonable doubt.

No. 5.

You are the sole judges of the credibility of the witnesses, of the weight of the evidence, and of the facts. It is your right to determine from the appearance of witnesses on the stand, their manner of testifying, their apparent candor or honesty or the lack thereof, which witnesses are more worthy of credit, and to give weight accordingly. In determining the weight to be given to the testimony of the witnesses you are authorized to consider their relationship to the parties, when the same is proved, their interest, if any, in the event of the suit, their temper, feeling or bias, if any has been shown, their demeanor on the stand, their means of informa-

tion and the reasonableness of the statements made by them, and all evidence affecting their character for truth, honesty or integrity, and to give weight to their testimony according to its just deserts.

If the jury believe that any witness in this case has knowingly sworn falsely to any material matter in the case, you would
26 be justified in disregarding the testimony of such witnesses entirely.

No. 6.

A defendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself, and can not be compelled to testify. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding.

No. 7.

In considering the law applicable to this case you are not to single out any one instruction as stating all of the law of the case. These instructions are to be taken together and considered as a whole by the jury. No one of them states all of the law of the case, but all of them when taken together state the law which is to be applied to the facts in the case as the jury shall find them to exist.

No. 8.

A valid law, in force in this State as a police measure, regulating the possessory right to use the public range, provides as follows:

"Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle
27 grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

To the giving of this instruction the defendant excepted.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

No. 9.

Before you can find the defendant guilty of the offense charged in the complaint, you must be satisfied beyond a reasonable doubt of the existence of each and all of the following material facts, to-wit:

1st. That the alleged offense was committed within one year prior to the 3d of September, 1914, on which date the complaint was filed in court.

2d. That the place where the alleged offense was committed is in Owyhee County, State of Idaho.

3d. That the defendant at such time had charge or control of sheep and that he wilfully and unlawfully herded, grazed or pastured the same upon a cattle range described in the complaint.

4th. That said range had been previously occupied by cattle, or was occupied by some or all of the cattle growers named in the complaint, either as a spring, summer or winter range for their cattle and that they, or their predecessors in the cattle business, had made the usual and customary use of such area of country as a cattle range, prior to any use thereof, in the usual and customary manner, as a sheep range.

28 5th. That said defendant knew, or had information from which a reasonable man under like circumstances would have known, that he was herding, grazing or pasturing sheep upon a cattle range previously occupied by cattle in the usual and customary use of such range, and that sheep had not been herded, grazed, or pastured upon said range prior to said time in the usual and customary use of said range.

But it is not essential to a valid notice to a person that a certain area is a cattle range for its exterior boundaries to be marked by signs or monuments, since the character and area of a cattle range are to be determined by its priority of use in the usual and customary manner as such.

To the giving of this instruction and each paragraph thereof the defendant excepted.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

No. 10.

Should you find from the evidence that all of the material conditions referred to in the preceding instruction are established beyond a reasonable doubt, you should render a verdict finding the defendant guilty of the offense charged in the complaint. And in case you should determine from the evidence that any of such material allegations are not so established, then you should find him not guilty.

To the giving of this instruction the defendant excepted.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendant.

29 No. 11.

It is a sufficient defense to the charge herein if you are satisfied that the range upon which the defendant grazed sheep had prior to his entry thereon been used and occupied, in the usual and customary manner, by both cattle and sheep as a range.

No. 12.

Five-sixths of your number, or ten jurors, may return a verdict. In case all of you agree upon a verdict, your foreman alone should

sign it, and if ten or more but less than twelve agree upon a verdict, then those so agreeing should sign such verdict. You should not resort to any means or methods of chance in arriving at a verdict. And when you have signed your verdict you should promptly return it into open court.

Appropriate forms of verdict for any conclusion that you may reach will be submitted to you for your use in returning a verdict.

(Signed) CARL A. DAVIS,
District Judge.

Filed Sept. 28, 1914. J. S. St. Clair, Clerk.

30 *Bill of Exceptions on Motion for a New Trial and Appeal.*

(Title of Court and Cause.)

Be it remembered that this cause came on regularly to be tried upon the — day of September, 1914, Honorable C. E. Melvin, Prosecuting Attorney of Owyhee County, and William Healy, Esq., appearing for the plaintiff, and S. L. Hodgin, Esq., of Oppenheim & Hodgin, appearing for the defendant. A jury of twelve men were duly empaneled and sworn to try the said cause and thereupon the following proceedings were had and the following evidence produced:

GEORGE SWISHER, a witness called and sworn in behalf of the State, testified as follows:

My name is George Swisher and I am the complaining witness in this case. I live at Juniper Mountain in Owyhee County and am in the cattle and horse raising business. I have been engaged in this business very near six years at Juniper Mountain.

State's Exhibit 1 for identification, a map, is shown witness.

Question: You may tell the jury what this purports to be.

Mr. Hodgin: Just a moment, Mr. Swisher. Your Honor, at this time for the purpose of preserving our record I wish to interpose an objection. We object to this witness testifying or to the
31 introduction of any testimony whatever under this complaint upon the grounds heretofore stated in defendant's demurrer and to each and every ground raised in defendant's demurrer, and for the further reason that Section 6872 of the Revised Codes of Idaho, under which this complaint is made, is in contravention of Section 1 of Article 1 of the Constitution of the State of Idaho; second, it contravenes Section 1 of the fourteenth amendment to the Constitution of the United States; third, that it is in direct conflict with the Act of Congress of February 25th, 1885, 23 U. S. Statutes at Large, page 321.

The Court: As it appears on the record, Mr. Hodgin, that is another way of raising the same law question on which the Court

passed indirectly in the demurrer, I believe, and the same ruling may govern, and the evidence may be admitted.

To which ruling of the Court the defendant excepted, which exception was allowed.

It was thereupon agreed by counsel and ordered by the Court that the record may show when each witness is called that defendant objects to any testimony on the same grounds as last stated, which objection is overruled, to which an exception is taken and allowed.

Witness continuing: This here, indicating the map marked State's Exhibit 1 for identification, is a map of the cattle and horse range described in the complaint. It shows the south fork of the Owyhee River, the north fork of the Owyhee River, Nichol Creek, Deep Creek, Smith Creek, the Idaho-Oregon state line and Three Mile Creek.

State's Exhibit 1 for identification is thereupon offered in evidence for the purpose of illustration, and admitted for such purpose without objection.

32 Witness continuing: The north fork of the Owyhee River is indicated by Figure 1 on State's Exhibit 1; Figure 2 on the Exhibit represents the south fork of the Owyhee River; Figure 3 indicates Deep Creek; Figure 4 indicates Nichol Creek; Figure 5 indicates Smith Creek; Figure 6 indicates the state line between Idaho and Oregon; Figure 7 indicates Three Mile Creek; Figure 8 indicates the outlines of Juniper Mountain. (Witness here indicates on the map the outline of Juniper Mountain). Figure 9 on State's Exhibit 1 indicates Circle Bar ranch owned by Ed Stauffer. Figure 10 indicates Lowry ranch owned by Lowry Brothers. Figure 11 indicates Pleasant Valley ranch owned by the Stauffers. Figure 12 indicates Pete McDonald's. Figure 13 indicates Charlie Maher's ranch. Figure 14 indicates Jim Swisher's ranch. Figure 15 indicates the Star ranch belonging to myself and Dave Sommerville. Figure 16 indicates Ben Bills'. Figure 17 indicates the Brace ranch, belonging to E. F. Brace. Figure 18 indicates Frank Swisher's ranch. That's Bull Basin. That's what they call the ranch (indicating). Figure 19 represents the C ranch belonging to Swisher and sons.

The approximate distance from the Idaho-Oregon state line to Deep Creek is somewheres between 15 and 16 miles. The approximate distance between the north side of Juniper Mountain and the south fork of the Owyhee River, on a guess, is somewhere about 10 or 11 miles, possibly 12. The distance on the Idaho-Oregon state line between the north fork of the Owyhee River and the south fork of the Owyhee River is about 12 miles. The witness here marks on the map the directions of the compass: N for north, E for east, S for south and W for west. In a general way the southern boundary of the range that I have described as a cattle range in my complaint is a deep canyon in which the south fork of the Owyhee flows, which is the main Owyhee River. The
33 eastern boundary of this range is Deep Creek, (indicating). The northeastern boundary of the range is the north fork

of the Owyhee River. But there is a range here. This is all cattle and horse range here to — on the north fork (indicating). The range described in the complaint extends as far north as the northern part of Juniper Mountain. The northwest boundary of this range is the north fork of the Owyhee River (indicating). The western boundary of the range, so far as the complaint is concerned, is the Idaho and Oregon line. Outside of the ranches that I have described as being in private ownership the balance of the land lying within the scope of the country described in the complaint is in public ownership, the title being in the United States and the State of Idaho. The scope of the country included within the boundaries of the range described in the complaint is mostly unsurveyed.

Mr. Hodgin: If the Court please, we object to this line of examination. It is wholly immaterial whether this country has been surveyed or not. The question here is whether it is exclusive cattle range and whether the defendant went upon the range.

Mr. Healy: One of the purposes of this evidence, if the Court please, is to show the impossibility of an accurate description of the range that is used as a cattle range, by government survey, that it is impossible to describe that range otherwise than by natural boundaries, or by metes and bounds.

The Court: For such purpose it may be admitted.

To which ruling of the Court the defendant excepted, which exception was allowed.

Witness continuing: The nature of the country along the south fork of the Owyhee River is rather broken. The south fork of the Owyhee River is not easy of access; it is a deep canyon and hard for cattle to get across. Deep Creek is mostly of the same
34 general character as is Nichol Creek and the north fork of the Owyhee River. The parties that at present use and occupy the range described in the complaint for the purpose of a cattle range are Stauffer and Stauffer, Lowry Brothers, Charles Maher, Jim Swisher, Sommerville and Swisher, Ben Mills, E. F. Brace, Ben Swisher, W. D. Winters, Swisher and sons, Pete McDonald. This range is used for both summer and winter range and for spring range. I have lived in that section of Owyhee County nearly six years. All of the country included within the map marked as State's Exhibit 1 is within Owyhee County, Idaho. At the present time I live on the ranch known as the Swisher and Sommerville ranch, indicated by Figure 15 on the map marked State's Exhibit 1. Dave Sommerville is in partnership with me. I have lived on that place nearly six years. During that time I have been familiar with the range described in the complaint. I have been familiar with it prior to that time. I first went there I think eleven years ago. I was just in there at different times. I didn't stay there all the time during that time; but that's the first time I was on the range, was eleven years ago. I have been there constantly during the last six years except when I was out on business or something. The range described in my complaint and indicated in State's Exhibit 1 is exclusively cattle and horse range and has been as long

as I have known it. The mountain enclosed in the large dark line on the map is summer range. This land in and around the mountain here and on the river (indicating on State's Exhibit 1) is winter range; that is, the land in to the south and on the east of Juniper Mountain. The land north of the south fork of the Owyhee is spring and fall range. I and other stock growers who have stock there hold our cattle on that range by riding after them and keeping them there and salting them there. Then there is deep canyons on the south and the north. And on the east there are
35 canyons with very small openings. I am not acquainted with Secundion Omaechevviaria, the defendant in this action, but I can describe him to you. I have seen him. I saw him on Juniper Mountain on August 15th and on or about June 24th. On June 24th I saw him on the head of Nichol Creek (witness marks by Figures 20 on State's Exhibit 1 where he saw the defendant on June 24th. Witness indicates by Figure 21 on State's Exhibit 1 where he saw defendant on August 15th.) I saw him on Castle Creek on August 15th; he was herding sheep. He had approximately two thousand sheep I think; he was nearly west from Deep Creek and south from Nichol Creek. He was upon the cattle range described in my complaint and which I have testified about on the witness stand. The sheep in charge of the defendant on that day had been herded on another portion of the range described in the complaint prior to that time: I saw the defendant on the morning of the 16th and I also saw him in June. I did not talk with the defendant on the day I saw him on Castle Creek. When I saw the defendant on August 15th he was about two miles from the Ben Mills ranch, about three miles from Swisher and Sommerville's place, about four miles west and between four and five miles south of Nichol Creek. He was on winter range for cattle and horses at that time and this was in Owyhee County, Idaho.

Q. About how much cattle, Mr. Swisher, if you know, are grazed upon the range described in your complaint and indicated upon State's Exhibit 1?

The foregoing question was objected to by defendant on the grounds that it was immaterial, irrelevant, incompetent and that it is nowhere alleged in the complaint that the range is occupied by sufficient cattle to use all the range or that is is wholly and completely occupied by cattle.

36 The Court explained that the matter was relevant as showing if there was a sufficient number of cattle to make it a reasonable conclusion that it was a cattle range and overruled the objection, to which the defendant excepted, and the exception was allowed.

There have been quite a number of cattle driven off of this range lately, but there was during the summer about five thousand head on it. About fifteen hundred head of beef cattle were shipped off this range during the present season. Between fifteen and sixteen hundred beef cattle were shipped from the range described in the complaint and indicated on State's Exhibit 1 in the season of 1913. I am engaged myself in the cattle raising business. I know that

this range described in the complaint and indicated on State's Exhibit 1 is fully stocked with cattle. The effect of grazing sheep on a range occupied by cattle is that it runs the sheep off the range—or the cattle. They won't raise together. The grazing of sheep upon a range mashes the grass down, tramps it out and leaves a scent on it where cattle nor horses neither one will graze. Sheep are generally in the charge of herders who have dogs. I have known these herders to run cattle off of the salt grounds when they came in with dogs and even they will run them off of the cattle salt grounds where they will come right in on them, the sheep will, if there is cattle there they will run the cattle off. I have known the Basques to do that lots of times. I do not know of any men engaged in the business of raising sheep who live in the territory described in the complaint and indicated on State's Exhibit 1. If there were any there I would know of it. There is nobody engaged in the sheep business living within the boundaries of the cattle range described in the complaint and indicated on State's Exhibit 1. (Witness indicates by Figure 22 on State's Exhibit 1 the location of Pleasant Valley Creek.) In different parts of the year
37 there are sheep on the territory along Pleasant Valley Creek. Just the head of this creek is within the boundary of the range described in the complaint. (The last sentence, on motion of counsel for defendant, was stricken out on the ground that the territory indicated was not within the boundaries of the range described in the complaint).

To which ruling the plaintiff excepted, which exception was allowed.

The usual and customary use of the range described in the complaint is cattle and horse range exclusively; it has been an exclusive cattle and horse range for eleven years.

Cross-examination by Mr. Hodgin:

I helped prepare the map marked State's Exhibit 1 when we had that trial in here before in the Probate Court about September 3d I believe. This map is just a copy, but it is of the same description as the map used in the Probate Court. The lines are not exactly identical with the other map. It is just drawn offhand. There are no changes in the map that I know of. The heavy line on State's Exhibit 1 used to indicate Juniper Mountain was described on the former map but not marked out. I have testified with reference to the distances indicated on State's Exhibit 1 but I have not measured any of those distances of the exterior boundaries. Figures 22 and 11 on State's Exhibit 1 are in cattle and horse range, but I have seen in there; but Figures 22 and 11 are not within the boundaries of the alleged cattle range as described in the complaint.

Q. Now, Mr. Swisher, I will ask you when you established the exterior boundaries of this alleged cattle range as indicated on State's Exhibit 1.

Mr. Healy: Objected to as assuming that the witness has established exterior boundaries for any range.

38 Which objection the Court overruled, to which an exception was taken and the exception allowed.

A. Well when I came there they—I understood that to be cattle and horse range. Sheep never crossed those lines. And they have been interviewed that that was cattle and horse range. When I went there I understood the boundaries of that range to be as described on the map; it was public opinion at the time I came there that such were the boundaries, and my understanding. I don't know if I can tell you who established those lines. I think I discussed the boundaries with most of the sheep men. I discussed them with Mr. Stauffer, with Mr. Ben Mills, with Mr. W. D. Winters, with Lowry Brothers, with James Swisher, with Swisher and sons, with E. F. Brace, with Pete McDonald and with Charlie Maher. I don't know that all of these parties were together at any one time, however, to make an agreement that this was an exclusive cattle range as indicated on State's Exhibit 1. But I discussed this matter with these various gentlemen at different times.

Q. And if you discussed it with each one in succession, did you agree that you would claim the range as indicated on State's Exhibit 1 as an exclusive cattle range?

Mr. Healy: Objected to as calling for a conclusion of the witness as irrelevant and immaterial; what the witness agreed upon with other people can't affect the actual facts in the case, which is whether or not this is a cattle range. That is a fact.

Which objection was by the Court overruled, to which ruling plaintiff excepted, and the exception was allowed.

A. It was an understanding between us when I went there. We knew it to be a cattle and horse range though I don't know of any agreement we had in particular. We discussed it among ourselves.

39 It has been discussed among some of us just prior to the filing of this complaint. I didn't have to claim the range as a cattle and horse range. It was already that. I agreed with those who took part in the discussion that we would claim it as an exclusive cattle range; and we agreed upon the lines as indicated in State's Exhibit 1. We did not mark out the boundaries of this range on the ground and we erected no monuments, only by canyons, the creeks and rivers.

Q. Did you put up notices on the ground that that was claimed as an exclusive cattle range.

Mr. Healy: Objected to as irrelevant and immaterial.

Which objection was overruled and the exception noted and the exception allowed.

A. No sir, but we went and interviewed those people before they came there and before they crossed those lines that we speak of, or boundaries. I did not notify Mr. —— that I had established those lines; I notified his herder, the defendant in this case. I notified other sheep men that I had established the lines and where the lines were. I have been notifying them for six years, ever since I have been there, strangers that came in.

Q. I will ask you now, Mr. Swisher, (you needn't answer until counsel has had an opportunity to object), by what authority you established the exterior boundaries of this cattle range as indicated by State's Exihibit 1?

Mr. Healy: Objected to as irrelevant and immaterial.

Which objection was by the Court overruled, which ruling was excepted to and the exception allowed.

A. It has been an old understanding between the old sheep men and cattle men.

Mr. Hodgin: If the Court please, I move to strike out the answer as not responsive to the question. The question was by what authority these men established that line.

40 Which motion was by the Court denied, to which ruling an exception was taken and the exception allowed.

With the exception of the ranches indicated on State's Exhibit 1, the land embraced within the exterior boundaries of this alleged cattle range is public domain. The government owns it; it is public land of the United States. We had about one thousand head of cattle in there I think before we shipped this fall. I have seen sheep within the boundaries as indicated on State's Exhibit 1. Seven years ago I think was the first sheep I saw. They were Miguel Corta's sheep and there were about two thousand of them, one band. I do not remember of seeing anyone else have sheep in there that year. There could have been a few bands in there without my seeing them. It was about 1907 that I first saw these sheep. I did not see any sheep within the boundaries in 1908. I saw sheep in there in 1909. They were McLeod's, I think his name was. He had one band that I saw. I didn't see sheep there in 1908; there could have been a number of bands in there without my knowing it. I saw sheep there in 1910. They were Will Skinner's. There was one band on this range. I didn't see any other sheep there in 1910, but there could have been several bands in there without my seeing them. I didn't to my recollection, see any sheep on this range in 1911. I don't think there could have been several bands in there without my knowing it. You understand we are out with our beef cattle in the fall of the year, and the sheep are in other parts of the range in Pleasant Valley Creek, and got in there, which they might have done, and got back across those lines again. They could have been in there without my knowing it. I saw sheep within the boundaries as indicated on State's Exhibit 1 in 1912. They belonged to Faustine Arzola. He had two bands in there in 1912 I think. I did not see any other sheep in there in 1912. There could not have

41 been any other sheep in there without my seeing them in 1912, because we moved these two bands of Arzola's out, or interviewed them and asked them to move back, and I had a man riding in there to see that no others went in there. They went into what we called Smith Creek and we moved them out. That is I asked them to move out. It was their first year in there and they were new men in the country. I couldn't watch the range all the

time and I know that there were no other sheep on that range in the year 1912 only by what I have understood. There were sheep there in 1913. They were Faustine Arzola's, the same man. He had three bands in there. No one else had sheep there in 1913 that I know of. But there could have been sheep in there without my knowledge. In 1914, besides the defendant, there were others who took sheep in there. I couldn't recall those people's names; they were all Bascoes; about seven different men in all I think; about seven bands. I do not confine my cattle entirely within the boundaries of the range as indicated on State's Exhibit 1. There is a portion of the range there, Pleasant Valley and through there, that the sheep come in there, but cattle run in the spring and fall. The sheep usually came into this portion of the range in July until last year. When I refer to Pleasant Valley I refer to the section marked by numbers 22 and 11 on State's Exhibit 1. Cattle run in that section in the spring and in the fall and sheep also run in there. The sheep generally run in there during the summer. Occasionally my cattle and the cattle of others, running on the range indicated on state's Exhibit 1, cross the boundary lines and go on to other ranges, some of them. We make an effort to confine them within the boundary lines of that range, however. Our cattle sometimes run over into Pleasant Valley. I have seen cattle in Pleasant Valley when there were sheep there. I have seen them together on the same range. They do not
42 stay on the same range very long. If the sheep were properly herded on the range, while they might not drive the cattle off the range, they would be inclined to damage the range for the cattle just the same. Sheep eat pretty much the same grasses that cattle do. Cattle will not do any damage to a sheep range unless it would be to a sheep herder. It would be possible to put cattle in large numbers on sheep range and crowd the sheep off, but not where the cattle are loose. If cattle were loose on the range and the sheep were herded, the cattle wouldn't stay there, but the fact that the herders have dogs with them and he don't like to have the cattle run in his sheep and he sets the dogs on the cattle has a whole lot to do with it. If the herder would let the cattle alone and not set the dogs on them, the cattle could stay there; Anyhow they wouldn't be destroyed as much as they are at present. I never saw Jack Noble on this range. But these sheep that I testified to being there with the exception of 1913, we interviewed them, and they didn't stay on the range very long, if you understand. I never saw Sam Noble with sheep in on that range. Neither Sam nor Jack Noble could have had sheep there any length of time without my knowing it. Some of us stock men ride there on that range most of the time. (Witness here indicates on the map marked State's Exhibit 1 what part is supposed to be summer range, what part is supposed to be fall range, what part is supposed to be spring range and what part is supposed to be winter range). The territory down on Smith, Nichols and Deep Creek is winter range; and the country between the southern boundary of the mountain proper and the south fork of the Owyhee River is also winter range. There never was sheep in here that I ever knew before (indicating) on this winter range. That's the first band of sheep

that was ever there. (Witness again indicates what is the winter range, the spring and fall range and summer range). The
43 winter range in here, part of it in here, (indicating) on the south, is right on the Oregon line on the west. Occasionally a few cattle cross over the line into Oregon; that is winter range. I have made two applications under the general land laws of the United States to file on land embraced within the boundaries as indicated on State's Exhibit 1. These applications are to lease land from the state. I claim only possessory rights to this land. We claim the right to the range by priority of right under the Code there — 6872. We claim this range by priority of right and also by law. I saw the sheep of Miguel Corta and McLeod and others, as testified on cross examination where I now indicate on the map by the Figure 23 (Witness marks map "23"). This is on the north side of Juniper Mountain. McLeod's sheep could have been there possibly two days and when we found him we asked him to move back, that he was on cattle and horse range, and he went back, and I think Skinner was in there four days on a portion of Smith Creek when Charlie Maher and I went up and saw him and he moved his sheep out of there. Miguel Corta, I think, was — when we interviewed him, I think he had been in there possibly three days. When we interviewed him he moved his sheep back. We didn't interview Miguel Corta, it was his sheep. We interviewed one of his herders. We told him he was getting down on the range too far, on the winter range, and he moved back. We told him he was out of his boundaries. I have never seen sheep on the portion of this range marked on the map by the Figure 21. That is the place where I saw the defendant on August 15th, 1914, but I never saw sheep there until that day. That is about two miles to two and a half miles from the house on my ranch, I guess. This place indicated on the map by Figure 21 is about six miles from where I saw McLeod's and Corta's sheep. The territory where I saw the defendant grazing his sheep on
44 August 15th, 1914, is partly in private ownership. I did not see him grazing his sheep on private land on this date. I saw tracks where he had been on private land. Where I saw the defendant with his sheep was on public land belonging to the United States of America, and unsurveyed land. The men whom I have mentioned as running cattle in this section of the country graze their cattle upon that portion of the range where I saw Corta's sheep and McLeod's sheep and Skinner's sheep in the period from 1907 to 1914. That section of the country is also cattle range and it is on the north side of the Juniper Mountain.

Cross-examination by Mr. Hodgin:

I testified that the land which the defendant was occupying with his sheep when I saw him was a winter range for cattle. There had been a few cattle there when he came in that year driven off of the mountain by the sheep coming in. I do not know this of my own knowledge, but simply that cattle wouldn't stay up there when you drove six bands of sheep among them. We held cattle off of this winter range during all the summer months. If they are not herded not

many of them would go back to the winter range, if they were left alone. (The witness indicates on the map where Miguel Corta was on the range in 1907). This would be north of Castle Creek and south of Nichol Creek. In 1909 McLeod's sheep were in here at Figure 23 (indicating on the map). That is on Pleasant Valley Creek. He wasn't right on the creek you understand, but on the side. It wasn't on the creek, it was in that section. (Witness here indicates, without marking the map, where Faustine's sheep were in 1912). In 1913 Faustine's sheep were in about the same territory (indicating) and in here (indicating). You understand these sheep were moved out before last year, and last year was when we
45 brought this case. From 1907 till 1914 sheep have gone in on the north portion of Juniper Mountain but they were moved out until last year, you understand. When they came in they only stayed a short period of time, two or three days, such a matter, until we went and interviewed them, and then they moved back. I do not know of a man named Honga who ever ran sheep in there on that mountain. I think that Miguel Corta's sheep were in there about three days in 1907, McLeod's sheep about two days in 1909, Skinner's sheep about four days in 1910. I am simply guessing at that. They were only there for a short time though, you understand. They could have been in there several days before I discovered them.

Redirect examination by Mr. Healy:

Those sheep that Mr. Hodgin has just been talking about were on a cattle range at the time I moved them out.

Recross by Mr. Hodgin:

We asked them to move out. We interviewed them, and they moved out, with the exception of one man, a Basco, we were quite a while making him understand it, but we never moved his camp, that I knew of, his being moved out. I never assisted them in packing camp and driving the sheep.

JOE NEWELL, a witness called and sworn on behalf of the state, testified as follows:

Direct examination by Mr. Healy:

My name is Joe Newell. I live down here in Pleasant Valley. I am acquainted with the scope of county described in the complaint in this action as being between the north and the south forks of the Owyhee River and west of Deep Creek. I first became acquainted with that country in 1877. I was there at that time working for J. P. Anderson who lived on the Humboldt, down there by Gol-
46 conda, which is a little town on the railroad. Mr. Anderson was moving his cattle out there to Juniper Mountain. He moved about a thousand head, a little over, and wintered there. I wintered right where Mr. Stauffer lives. Mr. Anderson had his headquarters on the Humboldt River and wintered right close to where Mr. Stauffer now lives on the Circle Bar Ranch. I worked for Anderson from 1877 to 1883 and during this time he was in the

cattle business and ranged his cattle on and around Juniper Mountain. I worked with his cattle during these six years and then I went to work for a man named —— —— who lives right across the Owyhee River, across the old Duck Valley ford. I have been on this ranch on and around Juniper Mountain since 1883; I was there in 1884. There wasn't very many of Anderson's cattle in there then; he had moved his cattle out across the river, most of them, but a good many of them, they went out. From 1877 to 1884 there were no sheep in and around Juniper Mountain that I ever seen. I think I would have seen them if they had been there.

Cross-examination by Mr. Hodgin:

I went there in 1877 with Mr. J. P. Anderson, whose home was on the Humboldt at Golconda. He just brought his cattle up into this country for a range. He has got cattle in there now, right across the river from Mr. Stauffer. In 1883 Anderson's cattle went out on the other side of the river just across from Mr. Stauffer's, and then you go down and cross three forks. If you can show me three forks there I can show you where they went in on that map (Mr. Hodgin explains the map to witness). When I went in there with Mr. Anderson's cattle we went in across Three Forks, and drove up the mountain to the Circle Bar ranch and built our little dugout there and wintered there. We crossed the south fork of the Owyhee River and went up on the northeast end of Juniper Mountain. Mr. Anderson's cattle would go back down across the south fork of the
47 Owyhee River, in winter time. Mr. Anderson did not take up land on that range. I don't know whether you would call Anderson a transient man there or just drove in there for range. You see the Humboldt River got *et* out so there wasn't much range in there and he drove his cattle in there for range. He called it a home range for his men that were working for him, but his home was on the Humboldt River at Golconda, his headquarters. Mr. Anderson run all the cattle he could get in there in the summer time and kept them in there in the winter time. That is, they would go out, as I told you before; they would go out and drift down across the river there. They wouldn't go on to their old range; they would go over across the river over on to what we call the desert. They wouldn't go on the Humboldt. He held that as a range all the time. When he wanted to put the cattle on the Juniper Mountain range he had to drive them in there; we would drive them in there in the spring of the year. Whenever we drove them out in the winter time they would string out whenever there was a big snow storm; there was no fences to keep them from going out. I went on that range in '77 and left there in '83. I went back there after some cattle in '84. I have not been back there on the Juniper Mountain since then. I do not know of my own knowledge whether sheep have run in there since '84 or not.

HARRY WILSON, a witness called and sworn on behalf of the state, testified as follows:

Direct examination by Mr. Healy:

I live in Owyhee County and I am pretty familiar with the range that is described in the complaint in this action that is located in and about Juniper Mountain in the western part of Owyhee County. That is the range between the north fork and the south fork
48 of the Owyhee River. I first got acquainted with that range in 1884. At that time I went in there and had a little bunch of stock of my own, and I worked for a man by the name of J. P. Anderson who was in the cattle business and ranged his cattle on Juniper Mountain and that surrounding country there. I was not working for Mr. Anderson all of this time. This Stauffer ranch was occupied, that is on the west end of this Juniper Mountain. A man by the name of Mulkey occupied it; he was in the stock business. He had some cattle, but he had mostly horses. He ranged them in that country, Juniper Mountain. There was some man by the name of Brown on the ranch known as the C ranch in 1884. This ranch now belongs to Swisher and sons. A man by the name of Jerome Lowry occupied the Lowry ranch at that time. He was the father of the Lowry brothers, who now occupy that ranch. Jerome Lowry was in the stock business at that time; he had some cattle there and some horses. He ranged his cattle right there in that country in and around Juniper Mountain between the two forks of the Owyhee River. At that time there was a man by the name of Rickert on the Brace ranch which is now occupied by Mr. E. R. Brace. He had a band of horses there. I couldn't tell you how many hardly, and some cattle. I think possibly about 150 head of cattle and about five hundred head of horses. The Circle Bar ranch and the C ranch and the Lowry ranch was about all that was occupied in that country in 1884. There was a ranch on what is called Castle Creek now. A man by the name of Castle took that up in 1885. That is the Swisher and Sommerville ranch. This man Castle had a small bunch of cattle. This J. P. Anderson that I mentioned as having gone to work for in 1884, had cattle in there during this period from 1884 to 1890. His headquarters used to be where the Circle Bar ranch is now; that is, it was when I worked for him there. In a way, he ranged
49 his stock there and built corrals in there and ranged them them there continuously at that time, you understand. He had a corral in Pleasant Valley and a camp there. He had cattle. During this period from 1884 to 1890 I did not see any sheep in and around Juniper Mountain. That was exclusively a cattle and horse country during that period. If there had been any sheep in there I think I would very likely have seen them.

Cross-examination by Mr. Hodgin:

I went in there in 1884 and stayed there until 1890. I worked for Mr. Anderson that summer and until a way along in the winter; I think about seven or eight months probably. Anderson had a ranch or a place there, and—well, in fact, he had two or three places around

that mountain; that is he built corrals there to work his cattle in. I wouldn't call a cow corral, to work cattle in, a ranch. He didn't have any land fenced, aside from the corral and didn't pretend to call it a ranch. He summered his cattle in there and wintered them in the surrounding country or Juniper Mountain. He didn't drive them across the south fork to winter; some of them used to go across the south fork to winter and some of them didn't, that was all. I suppose what Mr. Anderson called his home was on the Humboldt River in Nevada. This continued to be his home while I knew him. It is not his home yet. I think Anderson had about five thousand head of cattle. He did not run all of them on the Juniper Mountain, he ran the balance of them around this south fork of the Owyhee River, that's south of Juniper Mountain and in that country; that is, what you would call most within twenty or thirty miles of that country, understand; very few down on the Humboldt; there might have been a hundred or two hundred in that country. In a way Anderson's range extended from his home on the Humboldt to
50 Juniper Mountain, and in a way it didn't. He had a ranch on the Humboldt River, and he used to have to drive the cattle there in the fall ow the year to ship them on the railroad. He had men there, and he had some cattle he couldn't ship; they wasn't in shape, you understand; there wasn't much range there; he had a little ranch there and some he turned loose there. There was quite a lot of people occupied the range between Juniper Mountain and the Humboldt River outside of Mr. Anderson. But he used this range in a way. I don't think what cattle he run on Juniper Mountain were in the way of transient. He kept them cattle in there; he had cattle when I went there, and he kept the cattle there continuously after I left there. I left there in 1890. Mr. Mulkey had I think about 125 or 130 head of cattle in there. His business was principally raising horses. He had I think between four and five hundred head of horses. Mr. Lowry had probably four hundred head of cattle, or something like that. Rickert had about two hundred head of cattle and five or six hundred head of horses. His business was principally that of horse raising. While I was in there from 1884 to 1890 Mr. Castle had probably a hundred head of cattle and a small bunch of horses, probably thirty or forty head. I have been back on that range a few times since 1890 (the map is explained to witness by Mr. Hodgin). I have seen sheep within this boundary as indicated on the map. That is, north of Juniper Mountain I have seen sheep. I have seen sheep on Nichol Creek and I have seen sheep at the mouth of what they call Smith Creek. I never saw any sheep on Juniper Mountain. Sheep have not run in that country around Jupiter Mountain a good many years. The sheep that I see were where I tell you on the north said of Juniper Mountain. I never saw any sheep in Pleasant Valley. I never saw any sheep east of Deep Creek.

51 Redirect examination by Mr. Healy:

A firm by the name of Stauffer and Sweetser bought out Mulkey. That is the Circle Bar ranch that Mr. Stauffer now owns; that's

their iron that they use on their cattle. Stauffer and Sweetser bought out Mulkey in the fall of 1887. In the fall of '87 Stauffer and Sweetser drove a bunch of cattle from Humboldt River to the range in and about Juniper Mountain, I think possibly three hundred head. In 1888 they drove another bunch of cattle in there, probably four hundred head. I am just guessing at it. That is the cattle they brought in from Crane Creek. Since 1890 I have lived in Owyhee County probably seventeen or eighteen miles from the east end of Juniper Mountain and about fifteen miles from the north end of the Juniper Mountain. In a way I have been familiar with the range in and around Juniper Mountain since 1890. It has been used for cattle and horses.

Recross by Mr. Hodgin:

I have been on the range in the Juniper Mountain country since 1890, but I have not been up there every year. I think that I have probably been up there five or six times since 1890. I can't state of my own knowledge just what kind of stock has been run in there since 1890.

E. A. STAUFFER, a witness called and sworn on behalf of the state, testified as follows:

Direct examination by Mr. Healy:

My name is E. A. Stauffer. I am acquainted with the range described in the complaint in this action as being in and around Juniper Mountain and between the north and south forks of the Owyhee River, in this County. I first saw this range in the fall of 1888. My father was a member of the firm of Stauffer
52 and Sweetser. Stauffer and Sweetser in 1887 and 1888 drove in on this range 1487 head of cattle. They were ranged between the north and south forks and west of Deep Creek, on and around Juniper Mountain. Stauffer and Sweetser made their headquarters at what is known as the Circle Bar ranch which they bought from Mulkey. This ranch is indicated on the map by the number 9, and I occupy it at the present time. The name of the firm that owns it at the present time is Stauffer and Stauffer, consisting of my mother and myself. The firm of Stauffer and Sweetser and the firm of Stauffer and Stauffer have owned and occupied that ranch ever since 1887. We have had cattle continuously on the mountain in and around Juniper Mountain and between the north and south forks of the Owyhee River west of Deep Creek since '87. I was not on this range constantly after 1888 myself. I never took much interest in the ranch until after '96, but I was there almost every year, bringing stock in. I was living in the eastern part of Oregon where we were raising stock, and every year we brought in young steers, and in the fall of the year I drove the beef out of the Juniper Mountain to the railroad. There is a man by the name of Lowry in this section, there on Squaw Creek, four miles from the Circle Bar ranch who has had cattle there always ever since '88, to my knowledge; there has always been cattle on what is known as the C ranch since

that time. The C ranch is indicated on the State's Exhibit 1 by the letter 19, and Swisher and sons occupy it at the present time. The character of the range described in the complaint and indicated on State's Exhibit 1 since 1887 up to the present time has been horse and cattle range between the north fork and the south forks. I know this of my own knowledge; it has always been used for cattle and horses during that time. I would consider that that range is stocked to its full capacity of cattle and horses at the present time. Up to recently, until the beef was taken out, there
53 was in the neighborhood of five or six thousand cattle in and around that range. Fourteen or fifteen hundred head of beef cattle were shipped out of there this fall and about the same number in the fall of 1913. Sheep have not usually and constantly grazed on this range described in the complaint at any time since 1887 with the exception of just a small territory there, about four by three miles there on the north side of the mountain; they haven't been over any part of it, never ranged on it. No sheep were ever ranged on that portion of the range indicated by Figure 21 where the witness Swisher testified he saw the defendant on August 15th. The cattle men follow the custom of salting the cattle and also by keeping men employed driving them back to hold their cattle upon this range. There is deep box canyons along the north fork on the north range and the south fork on the south, and Deep Creek on the east side, natural boundaries. The range in and around Juniper Mountain is considered a good cattle range. I know of my own knowledge what the effect is of herding sheep upon a range that is used as a cattle range. It is owing to the length of time and how many sheep. Sheep may be herded on a range without doing any harm to the range if they are taken there at certain times of the year, while at other times of the year, why, they would naturally ruin the range, and owing to how closely they were herded and tramp out. Herding and grazing sheep in the usual manner of herding and grazing them upon a range that is occupied by cattle has always been considered injurious to the range. Where they are herded on the grass in the early spring it is injurious to the range. The fact of the grass being cropped off while it is growing in the spring stunts the grass and it doesn't seem to grow and weeds take its place. Herding a bunch of sheep upon a range where cattle are simply keeps the cattle a moving and they don't do well.
Cattle don't graze with sheep. They will not graze with
54 sheep or if sheep have been on the ground right after. Cattle will not stay near where they are herding sheep. The effect of herding and grazing sheep upon this range described in the complaint would be to drive all of the cattle off of the mountain and they would be unable to go to the salt lick. Sheep are usually in the charge of herders. It is not customary to herd our cattle. Cattle cannot hold their own against sheep on any particular range. I have seen the defendant. I saw him near our Pleasant Valley ranch indicated on the map by the number 11. I saw him there about August 1st. He came in with the sheep to one of Bicknell's camps and Honga had just come there and while Honga and I were

talking there, why, this herder came in. Honga is a man that I believe was tending camp for Mr. Bicknell at that time. Stauffer and Stauffer own this Pleasant Valley ranch. Sheep are run in there around that Pleasant Valley ranch and in the country northeast of Juniper Mountain during the summer months; they come in every summer. There has been no objection made to running sheep in there by anyone that I know of. There is a section of country there between the mountain, about seven miles wide and ten miles long, right in what has always been the cattle range, but at the same time the sheep but- in there in the summer time occasionally. There is no sheep men live there and own any ranches there. There is no sheep men own any land within twenty miles of this mountain. Everybody living on this mountain are cattle men, but these sheep men but- in every summer. Every time a sheep man goes into business and has no range, he comes on to Juniper Mountain. The sheep men but- in to the country north and northeast of Juniper Mountain and up around Pleasant Valley.

Cross-examination by Mr. Hodgin:

Stauffer and Stauffer bought the place in 1887 and we drove cattle in there in '87, but I didn't go in till '88. I didn't go
55 in with the cattle in 1887. I assisted in making this map marked State's Exhibit 1 and in marking out the exterior boundaries of the cattle range described in the complaint. I guess this map was made last night. The first map was made at the last trial here. I don't know as I ever established the lines marking the exterior boundaries of this cattle range described in the complaint, although I assisted in indicating them on the map. I said that this range is an exclusive cattle and horse range and has been for the past years with the exception of a small portion where sheep had butted in during the summer time at times, but the greater portion of all that, I have never seen sheep on it since I went on that mountain, and I know that sheep never were on a portion of it, with the exception of just a small portion there on the north side. I claim it is a cattle range. I say an exclusive cattle range, with the exceptions of parts of it; that sheep have never run on it with the exception of a portion, a tract there a few miles long and a few miles wide on the north side; but all of that on the south side and on the east side I have never seen sheep there; there has never been any sheep there; the sheep men have always respected that; they never would go on that. I first established, or assisted in establishing, the exterior boundaries of this cattle range, as indicated on State's Exhibit 1, along about twelve years ago. I did not erect any monuments, in particular, it wasn't necessary. The sheep men that were in there at that time all knew the creeks, and it was more bounded by the creeks—more than anything else, and mountains. I didn't put up any stakes with notices on them that that was the line of a cattle range. It wasn't necessary. Sheep men respected it without. Sheep men that were in that time were a different class than there is now. They were white men and they could understand English.

In order that the sheep men might know the location of
56 the boundary lines of that cattle range it was necessary for me or some one to notify each man as he approached the line with his sheep. I did notify Mr. Bicknell, the owner of the sheep which were in charge of the defendant, of the establishment of the lines indicated on State's Exhibit 1. I never saw Mr. Bicknell until yesterday, but his camp tender has known real well where the lines are. I didn't personally notify the defendant, the herder of the sheep, where the lines were. As to my authority in assisting to establish the boundary lines of this cattle range, I just took it onto myself, the fact of living there and owning a place in there and running stock and seeing sheep men and talking to them and being agreeable to them, to respect these boundary lines, or a certain portion of the country, which they have done. I have claimed legal right to the pasture growing on the range described in the complaint, if there is any legal right in pasturing stock upon a public range; the fact of living and owning land and having a prior right—I would consider that a legal right. I think I have a right to pasture cattle on there. I discussed with Mr. Swisher and the other men named in the complaint the question of the boundaries of the range as described in the complaint. This boundary here has been established in a way for over twelve years. We contend that everything within the boundaries is cattle and horse range, and with the exceptions, as I say, of a spot there where sheep have went, it has been exclusively cattle and horse range, never been used for anything else. We have not recently put up any monuments to mark the exterior boundary lines of that range so they would be visible to men approaching them, but then, years ago there was trees blazed and the boundary line was known by the road and creeks, as I stated before; we didn't have to put up any monument. Outside of
57 the land owned by the people living on this range it is public land of the United States. I have not made application to enter those lands under the land laws of the United States; it is all unsurveyed lands. I own four hundred acres there. I do not run all of the cattle that my Company owns upon the Juniper Mountain or range. We have a separate bunch of cattle running down Jordan Valley, entirely separate from that bunch. I winter the cattle that I run on Juniper Mountain right around there; part of this winter range is in Oregon. I own land in Oregon too, 1600 acres, right along the state line. Some of my cattle wander off of this range as indicated in State's Exhibit 1 and go across this boundary line. In the winter time they go down to the ranch across the state line—the state line is the boundary line; and we winter our cattle in and about the ranch across the state line. The Juniper Mountain range is summer, spring and fall range and some of our stock winter around Juniper Mountain, all around, on the south side and on the east side. I don't think I said that cattle wouldn't stay on a range after sheep passed over it. I think I said it was owing to the length of time that they had been on it and how much had been tramped over, if I remember correctly. If the range is overcrowded even with cattle they may eat the grass off until they can't stay

themselves, and the same is true of sheep. But if the range isn't over stocked, cattle and sheep may run on the same range, as long as there is grass. If sheep are properly herded I wouldn't judge that they would disturb the cattle as much as they do when the herder sets his dogs on the cattle and chases them around. I have seen cattle and sheep running on the same range, and at times have seen them mingle together some where the sheep are not too closely herded, probably for a few hours or so, we have seen them mix. It is not a fact that if large numbers of cattle were gathered up and driven on to a sheep range it would drive the sheep off. How could
58 they drive them off? The fact of the cattle coming on there would not drive sheep that were there, if the herder tried to hold them; how would the cattle drive them off. I don't understand what you mean by asking if you go to drive a big band of cattle into a little band of sheep and hold them there and drive the sheep off. If the herder holds them, how are they going to do it. The cattle would scatter all off and won't go among the sheep. I don't understand what you mean. If you gather up a large number of cattle and drive them into a small section of the country occupied by a small bank of sheep, the cattle would get the grass, I guess, what the sheep wouldn't get, and then they would all have to leave; is that what you are driving at? I don't think a man could herd a band of sheep in among a great herd of cattle where the cattle were being herded by men. Sheep couldn't stay very well not if my buckaroos were herding the bunch.

Cross-examination by Mr. Healy:

When I say that I have seen cattle and sheep on the same range I mean that the times the sheep and cattle graze among each other indiscriminately, where the feed is fresh, for a few hours or so at a time. They don't make a custom of doing that; they wouldn't live together, but he asked me if I ever saw cattle mingle with sheep; why, certainly I have, where sheep are herded loosely and scattered out I have seen a few head of cattle among them at times, certainly. Upon a range which is occupied by a man's sheep, cattle which are not herded or driven will not as a rule go among the sheep and graze at will, not for any length of time, as I say.

Recross-examination by Mr. Hodgin:

No, cattle do not stampede and run away at the first sight of sheep.

59 Redirect examination by Mr. Healy:

The reason that I and the other gentlemen mentioned in this complaint claim the right to this particular portion of Owyhee County described in the complaint as against sheep is from the fact of being there so many years, and no sheep men own any land in there, all the people in there being cattle men, and that the fact that sheep men have always respected this, and another reason is that sheep men today that are coming into this—to graze their sheep on this territory there—are new men, men who have never been there before, and I wouldn't consider had any right. I and these other

gentlemen, so far as I know their opinions, claim the right to that range as against sheep; we have used the range for cattle continuously.

WILL MAHER, a witness called and sworn in behalf of the state, testified as follows:

Direct examination by Mr. Healy:

I live in Jordan Valley and am acquainted with the country around Juniper Mountain between the north and south forks of the Owyhee River in this county. I first became acquainted with that portion of the country in '95. I worked there for B. W. Crutcher at that time. I owned what is known as the C ranch where Swisher and sons are, at one time. This C ranch is indicated on State's Exhibit 1 by the Figure 19. I first acquired that land in 1903 and owned it until 1912. During those nine years besides ranching I was there on Juniper Mountain from 1900 and run cattle, but I was at the Bull Basin place at first for three years; then I bought this C ranch. I got the Bull Basin place in 1900. That is the place south of Juniper Mountain that is now owned by Frank Swisher.

60 This range described in the complaint and embraced generally between the north and south fork of the Owyhee River and Deep Creek, Nichol Creek and Smith Creek has been used as a cattle and horse range. We considered the range stocked to its capacity. The place indicated on State's exhibit 1 by the figure 21, and described by the witness Swisher as being on Castle Creek, is a portion of that range. I have never seen sheep herded or grazed on that range.

Q. Do you know whether—what the effect of bringing bands of sheep on a cattle range has upon the cattle that are being grazed there, Mr. Maher?

A. Yes sir, our cattle used to come off the mountain whenever the sheep come on the mountain, when the sheep come on the mountain the cattle moved off.

Q. Do you know what effect grazing sheep upon a particular range has upon the grass?

A. Well, no, only where sheep has been grazed for a number of years, why, the grass dies out and weeds grow in.

If the herders allow the dogs to run after the cattle, they drive the cattle off. They turn the cattle loose on the range but have men riding to keep them on Juniper Mountain and also salt them up there and try to keep them, as near as they can, within these boundary lines. Cattle are not herded in this section in the sense that sheep are. There are natural boundaries to that range that prevent cattle from escaping from it. Of course there are trails going out across these canyons, but they make natural boundary lines around the mountain.

Cross-examination by Mr. Hodgin:

I first became acquainted with the range in 1895. I am familiar

with the map marked State's exhibit 1. I didn't help pre-
61 pare it, but was there and saw it prepared. I am familiar with the boundary lines. The line running from near point 1 across to point 7, is not a box canyon; it is just rough broken country. There is nothing to prevent cattle going up this way (indicating). The line running from figure 8 to a point where that line crosses Smith Creek is not a canyon all the way. The north fork is all in a box canyon, but there is a scope of country between the north fork and Nichol Creek that stock can go out. There are trails crossing the south fork, Deep Creek and Nichol Creek that stock can go out.

Q. Did you ever see any sheep within the boundaries as indicated on State's exhibit 1?

A. Yes sir.

Q. What year did you first see sheep within those boundaries?

A. I think it was in 1900, as near as I can remember.

Q. Whose sheep were they?

A. Sam Noble's.

Q. How many bands did he have in there:

A. I saw one band there.

—. Anyone else have sheep in there that year?

A. I didn't see any other sheep. Those come in on the north side of the mountain, and I wasn't in there very much on the Pleasant Valley side.

Q. Did you see any sheep in there in 1901?

A. Well, I don't remember just the years. I saw a few sheep in there on the north side of the mountain after that.

But I don't remember now what year it was. I was there two seasons that I saw him. I saw other sheep in there but do not remember what year it was, or who they belonged to.

62 Q. Well, I will ask you generally then, Mr. Maher, whether or not you saw sheep in there every year after 1900?

A. Not on the mountain. There was—I saw sheep every year along the foot of the mountain in this Pleasant Valley country, but I never saw but very few on the mountain. Some come in there and I never—but I never saw any of them. I knew there was sheep in there along the foot of the mountain, you know, but I never saw them. One of the parties saw them and went and talked to them and they went out before I ever come over there.

The defendant was in the portion of the range indicated by figure 21. I never saw any sheep in that section. All the sheep I ever saw were close to Pleasant Valley. They were within the boundaries of the range on Castle Creek, indicated by figure 21. It is a fall and winter range. I did not assist in establishing the boundaries of that range.

Redirect examination by Mr. Healy:

The sheep that I saw on the north side of the mountain were on a cattle range. Pleasant Valley is north from Juniper Mountain and is indicated by figures 11 and 12 on State's exhibit 1. The

Rickert wagon road runs right along the foot of the mountain on the north side.

(Witness excused.)

GLENN WOLCOTT, a witness called on behalf of the State, being duly sworn, was examined and testified as follows:

My name is Glenn Wolcott and I live on Juniper Mountain. I am engaged in riding for Stauffer & Stauffer. I was riding during the present summer on the north side of Juniper Mountain. On the north and east half of the range. I am not personally
63 acquainted with the defendant in this case. I know him when I see him. I saw him first on the 12th day of July, this summer; he was on Cottonwood Creek. Witness indicates on State's exhibit 1 by the figure 24 the location of Cottonwood Creek; by the figure 25 where he saw the defendant on the 12th day of July. Defendant was north of Rickert's wagon road. The Rickert wagon road is on the north side of Juniper Mountain, and runs right around the foot of the mountain. The Rickert wagon road starts doen here at Mr. Stauffer's ranch, it runs up here by the Loy boys' ranch, and runs up here and crosses Three Mile, runs up here and angles up here a little bit, then follows right along the foot of the mountain. I had conversation with the defendant on that day. I told him not to cross the line and go on to the mountain as that was a cattle range and that the wagon road was the line; that all above it was a cattle range and it wasn't agreeable for sheep to cross the line. Defendant said he wouldn't go across it. I saw him about three days later, he was up along the road and part of his sheep were across the road and going up the side of the maountain; that is, the north side of the mountain. I told him he had better get them down off there or someone would go to Silver and have him arrested for having sheep on a cattle range. He moved the sheep below the road, that is, north of the road. I saw him again at his camp about three-quarters of a mile above the Pleasant Valley ranch, where he was camping. (Witness indicates Pleasant Valley ranch on State's exhibit one, by the figure 11.) Defendant was there about 15 or 16 days; I talked with him pretty nearly every day. He was always talking about cattle range. I came to his camp one day and there was two camp tenders
64 there looking for a sheep range, and I told them about it, and the next day I went by there and he told me those fellows were going on the mountain.

Q. Do you know whose men those were that you talked with?

A. Yes, sir.

Q. Whose were they?

A. Lawson's camp tender, a Pete Utubi, I think his name is; they call him Little Pete.

Whereupon Mr. Hodgin moves to strike out all the testimony of this witness with reference to the two camp tenders, on the ground that it — wholly immaterial and not binding upon the defendant.

Exception overruled by the Court, to which ruling exception wa taken.

The last conversation I had with the defendant with referenc to the range, was somewhere around the 20th of July. I hav not seen him since.

Cross-examination by Mr. Hodgin:

I showed the defendant the boundary lines of the range, all tha I could and pointed out the rest to him. I told him the whole o Juniper mountain was a cattle range and that if he crossed tha line he would be arrested. I am employed by Mr. Stauffer. M Stauffer's foreman, Mr. Rode, instructed me to advise the sheep me that if they crossed the line, they would be arrested. I told th defendant, the cattle range consisted of Juniper Mountain.

Q. I will call your attention to the figure 21 on State's exhib 1, and ask you if that is on Juniper Mountain.

A. Well, it is on the slopes of Juniper Mountain.

Q. It is not on the mountain proper?

A. It is not clear on the top of the mountain, no.

65 Redirect examination by Mr. Healy:

Q. Did you tell him that just the top of the mountain was ca tle range, Mr. Wolcott?

A. No. I told him that inside of all of these lines was cattl range, and showed—pointed him out the lines. I think I men tioned Smith Creek as being one of the boundary lines.

Recross-examination by Mr. Hodgin:

I mentioned Nichol Creek and Deep Creek and showed them t him. Nichol Creek and Deep Creek are in view from Cottonwoo Creek, where I first saw the defendant. When I notified the de fendant not to cross the line, I gave him to understand that all th south side of this line was cattle range. I do not know who estab lished those lines.

Q. Who showed you the lines?

A. Mr. George Swisher, for one.

Q. Who else?

A. Mr. Rode told me where the line was when he sent me u there.

WILLIAM HICKS, a witness called on behalf of the State, bein duly sworn, was examined and testified as follows:

Direct examination by Mr. Healy:

My name is William Hicks; I live on Juniper Mountain an work for Dave Sommerville and George Swisher; I ride most of th time. I am not personally acquainted with the defendant but hav seen the man. I saw him first about the 7th day of August, 191 I was on Castle Creek, right below the mouth of Job Creek, about half a mile. (Witness indicates where he saw defendant by mark

ing the figure 26 on State's exhibit 1. I had a conversation
66 with the defendant and told him that when he crossed Nichol Creek and got on the south or west side of that creek, that he was inside the boundary lines of the cattle and horse range, and he was at that time three miles and a half or four miles from the line.

Q. Inside of the line?

A. Yes.

Q. What did he say?

A. He asked me whose place that was there, and I told him it was George Swisher's and Sommerville's.

He was half a mile below the Job Creek field right on the creek. I told him that he was on the winter range where there had never been any sheep at any time. I asked him if he was going to move out and he said his camp tender would be back in three days and move, and he didn't move. That was on the 7th of August. I saw him again at a distance the morning of the 14th or 15th, on the east side of Castle Creek, right on the table there. He was still on the cattle range.

Cross-examination by Mr. Hodgin:

He was within the boundaries of the cattle range when I first saw him; he moved out of there about the 15th or 16th. There were a few cattle running there at that time. That is a fall and winter range and is on the east slope of Juniper Mountain.

State rests.

Defendant waives opening statement, whereupon R. F. BICKNELL, a witness called on behalf of the defendant, being duly sworn, was examined and testified as follows:

67 I reside in Boise and am engaged in the general livestock business. I am running sheep on the range and buying and shipping sheep. I run sheep in Owyhee County and also own land there and the defendant is in my employ. I did not instruct the defendant to go upon the cattle range, as indicated on State's Exhibit 1, nor any other cattle range. I had a foreman out there who was supposed to look after that.

Q. Was you ever notified of the boundary lines of the cattle—alleged cattle range, as indicated on State's exhibit 1?

Whereupon objection was interposed upon the ground that the question was irrelevant and immaterial. Objection sustained. The Court explaining that the witness was not charged with committing any offense; that notice to the witness would not necessarily be notice to the defendant; that each individual stands on his own responsibility in committing any acts that amount to a crime.

Q. Have you ever run cattle?

A. I have.

Q. To what extent have you run cattle on the range?

A. Well, I have run cattle on the range—I run—in partners with

Mr. David Gemmell. We run cattle on the range at Pocatello for a couple—about three years, in connection with our sheep there, and we also run a bunch of cattle near Westfall well, between Westfall and Huntington, up on the head of Willow Creek. We run a bunch of cattle there a couple of years.

Q. Have you had an opportunity to observe whether or not cattle and sheep will run upon the same range?

A. Yes, I have handled them both upon the same range at the same time.

68 Q. Just state to the jury, Mr. Bicknell, whether you have ever seen cattle and sheep running upon the same range, and what condition they were in.

A. Well, the cattle that we run at Huntington and Pocatello both we had fat cattle and shipped beef——

Whereupon objection was interposed by Mr. Healy on the ground that it was improper for a witness testifying as an expert to relate specific instances. The objection was sustained. The Court explained that when one is testifying to an opinion that may be admissible in evidence, that the opinion itself generally may be given only, and not specific reasons for it.

Q. I will ask you, Mr. Bicknell, if you have seen cattle and sheep running on the same range in different years, at different seasons, running together on the same range?

Whereupon Mr. Healy objected for the same reason as before. Objection overruled, the Court explaining that the question is more general in its nature and might come within the realm of general information.

A. I have.

Q. How many different years?

A. Well, in a great number of years, all the time I have been handling cattle, several years.

Q. Were the cattle fat?

A. Yes, I bought both fat cattle and fat sheep off the same range.

Whereupon plaintiff moved to strike out the rest of the answer as not responsive after the word "yes", on the ground that it is relating specific instances. The Court ruled that the last clause be stricken out as not directly responsive to the question, to which ruling exception was taken, which exception was allowed.

69 It does not destroy a cattle range to graze sheep upon it unless it is overgrazed. It destroys any range to overgraze it, with cattle or sheep. If cattle are run in any considerable number on a sheep range, it will injure the range. If a large number of cattle were driven on to a small sheep range and held there, I think it would drive the sheep off.

Q. You heard the testimony of witnesses on behalf of the State that after sheep went over a range and cropped the grass off that it wouldn't—that it didn't grow up afterwards. You may state to the jury whether or not that is true?

A. I don't think that is true.

Q. Have you had occasion to observe a range after sheep has passed over it early in the spring?

A. Yes.

Q. Was the grass growing on it?

A. Grass growing on it afterwards.

Q. Did you ever see any cattle running on a range like that?

A. Yes, sir.

Q. Were they fat?

A. Yes, I know where there is a bunch of cattle right now that we grazed the range off in the spring.

Whereupon plaintiff moved to strike the answer for the same reason as before. Motion allowed by the Court.

Cross-examination by Mr. Healy:

Q. Mr. Bicknell, is your business more generally buying and selling stock than it is raising stock of your own?

A. I think it is about equally divided at present. I have been running a good deal of stock on the range the last three or four years, in partners with other people in a good many instances.

70 Q. Prior to that time you were engaged chiefly in buying and selling stock, were you?

A. Well, previous to ten years ago, I was. The last ten years I have been running a good deal of stock on the range.

During the present summer, I have been dividing my time between my range outfit out here in Owyhee County, I have been out there once a week, some times twice a week, and then I have another range outfit near Huntington, Oregon, between Brogan and Huntington, in that vicinity. I have never tended camp to speak of, or ridden the range to any great extent.

Q. Ins't it your opinion, Mr. Bicknell, that sheep hurt — herbage closer to the ground than cattle do?

A. They do some class of herbage. There is some class of herbage on the range that sheep won't eat at all, that cattle will get fat on.

Q. Well, isn't the effect of close herding to tramp out not only the feed that the sheep eat but also the feed that the cattle eat?

A. Well, I don't think it will tramp out, sheep will tramp out, a great deal of the feed that cattle eat. I don't think they will. I have—I have run—run them—run cattle on—put cattle on a range after I had taken sheep off, and eat it off what I thought was eaten off close for sheep, and we have had cattle run on that same range and get fat, and I have seen it in a number of instances, the same thing. If sheep are herded on a range where cattle are turned loose to graze, I think if the herders are mean enough to dog the cattle they wouldn't do so well, but if there is plenty of forage, I think both classes of stock would do well on the same range, I have seen lots of instances where it has been done.

71 Q. As a general proposition to—herders who are in charge of sheep are men who are not very particular about what their dogs do to cattle on the same range?

A. Well, I imagine that is true in some cases, not always though.

Q. You do not think, do you, Mr. Bicknell, that cattle grazing at large have the same chance to get their share of a range that sheep in charge of a herder and dogs have, do you?

A. Well, I don't think they would close aroung the camp. It would depend a good deal on how sheep was handled. Now, if sheep are not herded into camp every night, that is, where they—if sheep are bedded out on a range and not driven into camp, they do not destroy a range like they do if driven into camp every night, and I think under those conditions, if sheep are turned in a mere open herding, loose herding, are turned loose on the range, and not close herded, that they will not interfere with cattle running on the same range like they would if they were close herded and driven into camp every night.

Q. If the range we have been talking about all the afternoon was thrown open to all the sheep people who wanted to herd there, would it have any effect on the cattle industry in that section do you think?

A. I am not familiar with this particular tract of country out there. Some sections of country it would have more interference than it would in others. I am not acquainted with the grass or forage that grows in that section of the country and I have not heard any description of the class of forage on that range; where there is a good deal of bunch grass, sheep don't eat bunch grass, you have to starve a bunch of sheep almost to get them to eat it. I have seen
72 them get poor where there would be lots of bunch grass growing on a range where cattle would get fat. On that range sheep would get poor.

Q. You do not mean to say that sheep that are close herded and driven over bunch grass won't hurt the grass, although they don't eat it?

A. Well, I don't think they will damage it so very much. I don't think they will tramp—they will walk around if it is a big bunch of bunch grass up there. I never say any range where the bunch grass was — out. Sheep form little paths around big bunch grass or big shrubbery, and I can't conceive a condition where it would be possible to tramp out bunch grass if it had any growth at all.

I am not engaged exclusively in the sheep business; I am handling cattle also. I have handled cattle as largely as I have sheep but not in number.

J. W. STARKEY, a witness called on behalf of the defendant, being duly sworn, was examined and testified as follows:

Direct examination by Mr. Hodgin:

I live in Boise and am in the sheep business; have been in the sheep business for ten years and handled cattle for nine years before going into the sheep business. I have heard the testimony of the witnesses for the State to the effect that sheep will drive off cattle. I have seen sheep and cattle running on the same range; the cattle were not particularly fat, but it was the spring of the year. I have

seen cattle running on a range that had been grazed over in the spring by sheep.

Objection by plaintiff, whereupon question was withdrawn.

73 Q. I will ask you, Mr. Starkey, whether or not you have ever seen sheep and cattle running on the same range?

A. Yes, sir.

Q. If sheep are properly herded, is it possible for cattle and sheep both to thrive on the same range?

A. Yes sir.

Q. Have you ever seen that condition existing?

A. I have.

Q. Very often?

A. Yes sir.

Q. Have you ever seen cattle and sheep running in the same pasture?

A. Yes sir.

Q. Were they fat?

A. Yes sir.

Q. Have you seen this condition quite frequently?

A. Yes, sir, every year that I have been in the business.

Q. If cattle were driven on to a sheep range in large numbers, would they drive the sheep off?

A. Yes sir. I might state that conditionally, though. It would be optional with the man whether he took them off or kept them there and run them to a disadvantage, but they wouldn't do well.

Q. Well, it would injure the sheep to have the cattle come in on their range in any considerable number?

A. Yes.

Cross-examination by Mr. Healy:

Q. Did you ever see sheep come upon—or cattle come upon a sheep range and drive the sheep off, Mr. Starkey?

A. Well, I felt like taking mine off this spring when they pulled in on me.

Q. That isn't the question. I think if you will pay attention to the question you can answer it, Mr. Starkey.

A. I have seen them mix up with the sheep and do considerable damage.

Q. Did you ever see cattle come upon a sheep range without being driven and drive the sheep off?

74 A. Yes sir, not drive them entirely off, but drive them from the places where they were feeding mix up with the ewes and lambs, and often the lambs, separate the lamb from its mother.

Q. Did you ever see sheep driven on a range where cattle were and have the cattle depart from that range?

A. No sir.

Q. You never saw that?

A. No sir. It never happened to come under my observation.

Q. But the other has come under your observation.

A. Yes sir.

Q. How many times?
A. Well, it's more particularly the last two years on my range.
Q. Were the cattle in charge of a herder?
A. The men were there with the cattle, right on the range.
Q. The sheep had to leave, did they?
A. No, I leased land from the State. I got this land in sheep so that I could lease it. It is the only way that I could hold my ground.
—. I do not think that cattle running loose with sheep that are in charge of herders with dogs have an equal chance.
Q. Don't you think, Mr. Starkey, that where the custom is to allow cattle to run without a herder upon the range that they are in need of some protection against sheep in charge of herders and dogs?
A. That depends upon the circumstances of the range conditions.
Q. Well, take general range conditions in Owyhee County, if you know those conditions?
A. I am not familiar over here with range conditions.
Q. You don't know anything about range conditions in this county?
A. No sir.

Whereupon plaintiff moves to strike out all the evidence with reference to the matters this witness has testified to. Motion overruled. To which ruling of the Court the plaintiff excepted.

75 I was not in the cattle business myself but was working for a man that run cattle; he is not in the cattle business now, he is dead.

Redirect examination by Mr. Hodgin:

I was working for Mr. Tom Davis of Boise. I worked for nine years—handled his cattle on the range to some extent. I was foreman of his cattle ranch, in Long Valley and had charge of the cattle there the bigger part of the year.

Recross-examination by Mr. Healy:

I was foreman of the ranch; I was in charge of the cattle at times. I had charge of all the cattle that were left there in the winter time and up until the time the men would come in there the latter part of June.

W. D. EVANS, a witness called on behalf of defendant, being duly sworn, was examined and testified as follows:

Direct examination by Mr. Hodgin:

I live in Mountainhome and I am engaged in the hotel business. I was engaged in stock raising in Owyhee County since 1886. Prior to that time I worked four years on the range for other parties. I have raised cattle and handled them on the range in Owyhee County; I have also handled sheep in Owyhee County for myself and for other men. I was familiar with the range conditions up until the

time I went to Mountain home, about eight years ago. I have run both sheep and cattle and horses on the same range in Owyhee County.

Q. Were they fat?

A. Yes sir.

I am familiar with the country that has been referred to as the Juniper Mountain country; I have been on that range and I have also been on Castle Creek. I am familiar with the country
76 between the north and south fork of the Owyhee River and east and west of Pleasant Valley. I am familiar with the creek running off of Juniper Mountain on the east side, called Castle Creek. I have been on that creek and have run sheep in there.

Q. How long ago?

A. Why, in about '84 and '85. About '84 is the first time I moved on there.

Q. How many bands did you have in there?

A. Two.

—. I am acquainted with the creek called Deep Creek: my camp tenders moved the sheep in there and I went to the camps.

Q. Where were the camps when you went to them?

A. There was one on what they called Nip & Tuck, and one on what they called Nichol Creek, and two on what they call Castle Creek.

Q. Mr. Evans, I will ask you, if sheep is properly herded if they will damage a cattle range and drive the cattle off?

A. Why, if they are put thick enough, yes.

Q. Providing the range is not overstocked, can sheep and cattle run on the same range?

A. I have run mine together.

Q. Did they get fat?

A. I sold the beef to Mr. Stauffer.

Cross-examination by Mr. Healy:

I had cattle on Deer Creek, the sheep did not run me out of there. In 1884 besided running sheep I was working for Bob Noble. Nip & Tuck is over on the other side of Josephine, Anna Valley.

Q. Is it east or west of Deep Creek?

A. I—now, it is seventeen years since I was there. I think it is east—or west.

Castle Creek runs into what is called Battle Creek, if I remember right. I do not know where Smith Creek is. I have heard of it. I could not say positively where it is. I do not know where Squaw Creek is or Cottonwood. Job Creek is on this side—that is on Juniper Mountain. Battle Creek runs into the Owyhee River; Castle Creek runs into Battle Creek. Nip and Tuck is on
77 *is on* the other side of Josephine. I am in the hotel business in Mountainhome. I have seen lots of cattle in Juniper Mountain country. That was a cattle country seventeen years ago.

Q. It was generally regarded as a cattle range at that time, wasn't it, Mr. Evans?

A. Cattle and sheep range.

Q. What were you doing seventeen years ago?
A. Running sheep.
Q. Who for?
A. Myself.
Q. When was the first time you were ever in around Juniper Mountain?
A. '84, I think.
Q. You were there in '78?
A. No sir.
Q. You don't recollect telling Mr. Stauffer this morning that you were on Juniper Mountain in 1878?
A. I said I came here in 1878.
Q. Well, you didn't tell Mr. Stauffer this morning that you were on Juniper Mountain in '78?
A. I don't think I did, no sir.
Q. You didn't tell him you saw ten thousand dead cattle there, did you?
A. I told him I saw cattle I could walk on, yes sir, and I say that now.
Q. What year was that?
A. That was 1887, and '86. I said I saw cattle under Juniper trees so thick that you could walk on them and never step on the ground.
Q. And you think that was in 1887?
A. It was in 1887, no mistake about it.
Q. Whose cattle were they?
A. Mike Hyde's, Bill Hardiman's and Penrose's, Bill Toy's and——
Q. Was that on Juniper Mountain, Mr. Evans?
A. No sir.
78 Q. Whereabouts was it?
A. In Castle Creek and up at the head of Castle Creek, and over into what they call Mud Flat, through that country.

Redirect examination by Mr. Hodgin:

There was a great many cattle died in that year. Those two hard years put a great many cattle men out of business.

E. A. STAUFFER, a witness called on behalf of the State in rebuttal, having been previously sworn, was examined and testified as follows:

Nip & Tuck Creek is east of the range we have been talking about this afternoon, about five miles, I should judge. Battle Creek is farther south and east of Deep Creek. I have never been out to Battle Creek. Neither Nip & Tuck Creek nor Battle Creek are on the range described in the complaint. They are east of that place.
Q. What creek does Castle Creek run into?
A. Castle Creek runs into—into Nichol Creek. Castle Creek runs into—I don't know whether it runs into Deep Creek or Nichol Creek.

Cross-examination by Mr. Hodgin:

Q. Mr. Stauffer, Castle Creek runs off of the east or southeast side of Juniper Mountain, doesn't it?

A. Yes.

Both sides rest.

Mr. Hodgin: It is stipulated and agreed between the counsel for the State and the defendant that either party may have ten days within which to take exceptions to instructions given and refusal by the Court to give instructions requested, and to prepare file and serve a bill of exceptions.

79 Mr. Healy: That's all right, Mr. Hodgin, except that I suppose insofar as we are concerned we wouldn't have any right to take any exceptions to the instructions anyway, but the stipulation is all right just as it stands.

The Court: You may do so, if you wish to, Mr. Healy. You have a right. You may appeal the matter on the law of the case if you wish to in the event of an- contingency making that necessary in your judgment.

Mr. Healy: Very well, the *the* stipulation is all right.

The Court: It wouldn't, of course, affect this case in the least, but there is a statute specifically providing for the purpose of establishing the law to govern similar cases in the future that the State may take any adverse judgment against it to the Supreme Court.

Mr. Healy: That's on what grounds; on the grounds of erroneous instructions?

The Court: Yes, that would raise the whole case.

Mr. Healy: Not on the ground that the jury has brought an adverse verdict?

The Court: No, because, you couldn't affect the verdict in this case by appeal anyhow.

Mr. Hodgin: If your Honor please, I almost forgot. I desire to make a motion for the purpose of preserving the record, and really I don't know whether it is proper for me to make it in the presence of the jury or not.

The Court: Gentlemen, the court will have a brief recess now.

(Jury duly admonished.)

The Court: You may be excused for five minutes, gentlemen.

(The jury left the court room.)

80 A recess was taken from 8:25 to 8:27 P. M., at which time the Court met pursuant to recess, the jury not being present.

Mr. Hodgin: If the Court please, I would like to have the record show that at the close of the State's case the defendant moved the Court to instruct the jury to find the defendant not guily upon the grounds heretofore stated in defendant's demurrer, and each and every groung raised in defendant's demurrer, and for the further reason that Section—further reasons that Section 6872 of the Revised Codes of Idaho, under which this prosecution is brought, is in contravention of Section 1, Article 1, of the Constitution of the State of Idaho.

Second, that is contravenes Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Third, that it is in direct conflict with the Acts of Congress of February 25, 1885, 23 U. S. Statutes at Large, page 321.

And for the further reason that the State has failed to prove that the exterior boundaries of the alleged cattle range, as described in the complaint, were fixed, established nor marked out by any competent authority, nor at all, at the time of the commission of the alleged offense.

The Court: The motion will be overruled.

Mr. Hodgin: And exception noted.

The Court: Yes.

Mr. Hodgin: And the record may show at the close of the testimony for the defense the defendant renews his motion for an instructed verdict upon the grounds and for the reasons heretofore stated.

81 The Court: The renewed motion may be denied, Mr. Clerk—Mr. Reporter.

The Court: The court will be at recess a minute or two, and then we will take up the argument of the case, gentlemen.

(Arguments omitted.)

Case closed.

82 It is stipulated by and between the attorneys for the plaintiff and the attorneys for the defendant that the foregoing may be settled and allowed as defendant's bill of exceptions on motion for a new trial and appeal containing the entire evidence taken at the trial and that the time for the preparation of the same has been duly extended by the Court.

Dated May 8, 1915.

WILLIAM HEALY,
RUSSELL G. ADAMS,
Prosecuting Att'y, Attorneys for Plaintiff.
OPPENHEIM & HODGIN,
PERKY & CROW,
Attorneys for Defendant.

Pursuant to the foregoing stipulation of counsel in the above entitled cause, it appearing that the time for the preparation, serving and filing of the above bill of exceptions has been duly extended by the Court, there being no objection to said bill of exceptions, and the attorneys for the plaintiff and the attorneys for the defendant being present, the foregoing is settled and allowed as defendant's bill of exceptions on motion for a new trial and appeal, containing the entire evidence taken at the trial.

Done this 8th day of May, 1915.

CARL A. DAVIS,
District Judge.

Filed May 8, 1915.

83 *Defendant's Bill of Exceptions Number Two on Order Denying New Trial.*

(Title of Court and Cause.)

Be it remembered that the time for making the same having been duly extended by order of the Court, the defendant on the 8th day of May, 1915, made and filed a motion for a new trial in words as follows:

Motion for New Trial.

(Title of Court and Cause.)

Comes now the defendant in the above entitled action, (the time having been duly extended by order of the Court in which to make this motion), and applies to the Court for a new trial in the above entitled cause on the following grounds:

1. That the Court misdirected the jury as to matters of law and has erred in the decision of any questions of law arising during the course of the trial.

2. That the verdict in the above cause is contrary to the law and the evidence in this:

That the statute under which the complaint in the above cause is drawn is unconstitutional and void; and that the evidence is insufficient to justify the verdict in this:

1. That the evidence fails to show the commission of any crime on the part of the defendant.

2. That the evidence fails to show that at the time of the alleged offense there was any well defined or bounded cattle range.

84 3. That the evidence fails to show that at the time of the alleged commission of the offense charged the defendant had knowledge of any well defined cattle range on which he was forbidden to trespass.

4. That the evidence affirmatively shows that the provisions of Section 6872 of the Revised Codes of Idaho, under which the complaint is made, is unreasonable, unfair, and is class legislation, and that such evidence shows that said Section 6872 contravenes Section 1 of Article 1 of the Constitution of the State of Idaho and Section 1 of the fourteenth amendment to the Constitution of the United States and is in conflict with the Act of Congress of February 25th, 1885, 23 U. S. Statutes at Large, page 321.

This motion is made upon the minutes of the court and the records and files in the above cause and upon the bill of exceptions on motion for new trial and appeal heretofore made, filed and settled in the above cause.

OPPENHEIM & HODGIN,
PERKY & CROW,
Residing at Boise, Idaho, Attorneys for Defendant.

Filed May 8th, 1915.

The above motion for a new trial was heard upon the records and files in the cause, upon the minutes of the court and upon defendant's Bill of Exceptions on Motion for New Trial and Appeal heretofore filed and settled, and by reference incorporated herein, said
85 Bill of Exceptions containing all of the evidence. The said motion for a new trial having been duly served upon opposing counsel, by stipulation of the parties made in open court it was agreed that the same might be heard on this day, Oppenheim & Hodgin appeared at the hearing thereof on behalf of the defendant, and William Healy, Esq., appeared as attorney for the plaintiff. And the motion being presented and heard and the arguments of counsel made, the Court thereupon made and filed its order denying a new trial in words and figures as follows:

Order Denying New Trial.

(Title of Court and Cause.)

Defendant's motion for new trial coming on to be heard at this time pursuant to the stipulation of the parties that the same might be heard, William Healy, Esq., appearing for the plaintiff and Oppenheim & Hodgin and Perky & Crow appearing for the defendant, and the arguments of counsel having been made and the matter being considered by the Court and the law and the premises being fully understood, the Court renders its decisions thereon.

Wherefore, it is ordered that the defendant's motion for new trial be, and the same is, hereby denied and overruled.

CARL A. DAVIS, *Judge.*

Dated May 8, 1915.

86 To which order of the Court denying a new trial the defendont at the time excepted, which exception is allowed and settled.

Stipulation.

(Title of Court and Cause.)

It is stipulated and agreed by and between the counsel for the respective parties hereto that the above Bill of Exceptions on Motion for a New Trial may be settled as true and correct, and that the said Motion for a New Trial was made within the time allowed by law as extended by the Court.

RUSSELL G. ADAMS,
Prosecuting Attorney,
WILLIAM HEALY,
Attorneys for Plaintiff.
OPPENHEIM & HODGIN,
PERKY & CROW,
Attorneys for Defendant.

The foregoing Bill of Exceptions came on for settlement this 8th day of May, 1915, plaintiff appearing by its attorney, William Healy, Esq., and defendant by his attorneys, Oppenheim & Hodgin and Perky & Crow, and the attorneys for the respective parties having by written stipulation consented that the above and
87 foregoing be allowed as defendant's Bill of Exceptions on Order Denying a New Trial, and it appearing that the said Motion Denying a New Trial has been made in due time, and within the time allowed by the order of the Court extending the same.

It is ordered that the above and foregoing Bill of Exceptions is settled and allowed this 8th day of May, 1915, as defendant's Bill of Exceptions on Order Denying a New Trial.

CARL A. DAVIS,
District Judge.

Filed May 8th, 1915.

It is hereby certified and settled as a part of the foregoing Bill of Exceptions that the following papers, towit: Complaint; Amended Complaint; Judgment in Probate Court; Notice of Appeal from Probate Court; Bail Bond; Demurrer in District Court; Defendant's Requested Instructions in District Court; Instructions of the Court in District Court; Minutes of the Court in District Court, containing the Verdict and the Judgment of the Court rendered thereon; and Defendant's Bill of Exceptions on Motion for a New Trial and Appeal, duly settled, containing all of the evidence and proceedings at the trial, all of which are of the records and files in this case, were submitted to the Judge and by him used on the hearing of the Motion for New Trial, and constitute all the records, papers and files used or considered by said Judge on such hearing.

CARL A. DAVIS,
District Judge.

Dated May 8, 1915.

88 *Notice of Appeal.*

(Title of Court and Cause.)

To the above named plaintiff and to its attorneys, William Healy, Esq. and Russell G. Adams, Prosecuting Attorney of Owyhee County, Idaho, and to the Clerk of the above entitled court:

You will please take notice that the above named defendant, Secundino Omaechevviaria, hereby appeals to the Supreme Court of the State of Idaho from the judgment of the above entitled court made and entered in the above cause upon the 29th day of September, 1914, whereby the above named defendant was found guilty of the crime of misdemeanor committed on or about August 15th, 1914, in Owyhee County, Idaho, by wilfully and unlawfully grazing and pasturing, upon a certain cattle range described in the complaint, previously occupied by cattle and usually occupied by certain cattle growers named in the complaint as a spring, summer and winter range for their cattle, which said range was usually and

customarily used as a cattle range, a band of sheep which the defendant had in his charge and under his control, and adjudging that the said defendant pay a fine of $150 together with costs of prosecution taxed at $229.15.

And the said defendant hereby appeals from the order of the above entitled court made and entered in said cause upon the 8th day of May, 1915, whereby the said defendant, having applied therefor, was by the said court denied a new trial.

This appeal is taken upon all questions of law and fact
89 hereafter to be presented and shown to the court in the transcript on appeal.

OPPENHEIM & HODGIN,
PERKY & CROW,
Residing at Boise, Idaho,
Attorneys for Defendant.

Service of the above and foregoing Notice of Appeal by receipt of a copy thereof, acknowledged this 13th day of May, 1915.

WM. HEALY,
RUSSELL G. ADAMS,
Attorneys for Plaintiff.

J. H. PETERSON, *Att'y Gen.*,
By COFFIN.
J. S. ST. CLAIR, *Clerk.*

Filed May 13, 1915.

90 *Stipulation.*

(Title of Court and Cause.)

It is hereby stipulated that the above and foregoing transcript contains full, true and correct copies of the papers and other matters therein contained as the same appear therein and that the Clerk of the District Court of the Third Judicial District of the State of Idaho in and for Owyhee County may certify to the same as true and correct. It is further stipulated that the exhibits in said cause may be certified by the Clerk and sent up to the Supreme Court without copies being inserted in the transcript.

RUSSEL G. ADAMS,
WM. HEALY,
Attorneys for Plaintiff.
OPPENHEIM & HODGIN,
PERKY & CROW,
Attorneys for Defendant.

Certificates of Clerk.

STATE OF IDAHO,
County of Owyhee, ss:

I, John S. St. Clair, Clerk of the District Court of the Third Judicial District of the State of Idaho in and for the County of

Owyhee, do hereby certify that the foregoing transcript contains a full, true and correct copy of the following papers and matters on file and of record in my office in the criminal action in the above entitled court entitled: "State of Idaho, Plaintiff, vs. Secun-
91 dino Omaechevviaria, Defendant", towit: Complaint and Amended Complaint; Minutes of the Court containing the Verdict and Judgment; Bill of Exceptions used on Motion for New Trial containing the evidence in said cause; the Instructions given by the Court and all Instructions requested and refused and the endorsement of the Court thereon; Defendant's Demurrer; Defendant's Bill of Exceptions Number Two on Order Denying New Trial; and the Notice of Appeal. And I further certify that the said papers constitute the record made by me in said cause.

In witness whereof I have hereunto set my hand and affixed my official seal this 24th day of May, 1915.

[SEAL.] J. S. ST. CLAIR,
Clerk of the District Court of the Third Judicial District of the State of Idaho in and for the County or Owyhee.

92 *Record Entries.*

BOISE, IDAHO, September 9, 1915.

SUPREME COURT,
State of Idaho, ss:

Court met pursuant to adjournment.

Present: Hon. Isaac N. Sullivan, Chief Justice; Hon. Alfred Budge, Justice; Hon. Wm. M. Morgan, Justice, and the officers of the court, when the following proceedings were had, towit:

No. 2386.

STATE OF IDAHO, Appellant,
vs.
S. F. HORN et al., Respondents.

No. 2659.

STATE OF IDAHO, Respondent,
vs.
SECUNDINO OMAECHEVARRIA, Appellant.

These cases having been heretofore set for hearing, now on this day the same were called, T. C. Coffin, as assistant to the Attorney General, and J. T. Pence appearing for the state in No. 3286, and J. M. Stevens appearing for respondents; and S. L. Hodgin[illegible]ar-ing for appellant in No. 3659 and T. C. Coffin, as assistant to [illegible]t-torney General, and Wm. Healy appearing for the State. In ac[illegible]-ance with agreement of counsel, the hearing of these cases was c[illegible]-solidated. After argument the causes were submitted and by [illegible]e court ordered taken under advisement.

93 BOISE, IDAHO, October 5, 1915.

SUPREME COURT,
State of Idaho, ss:

Court met pursuant to adjournment.

Present: Hon. Isaac N. Sullivan, Chief Justice; Hon. Alfred Budge, Justice; Hon. Wm. M. Morgan, Justice, and the officers of the court, when the following proceedings were had, towit:

No. 2659.

STATE OF IDAHO, Appellant,
vs.
SECUNDINO OMAECHEVARRIA, Respondent.

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Justice Budge, to the effect that the judgment of the lower court be affirmed.

It is therefore considered, adjudged and decreed by the court that the judgment of the District Court of the Third Judicial District, in and for the county of Owyhee in the above entitled cause be and the same hereby is affirmed.

94 BOISE, IDAHO, October 6, 1915.

SUPREME COURT,
State of Idaho, ss:

Court met pursuant to adjournment.

Present: Hon. Isaac N. Sullivan, Chief Justice; Hon. Alfred Budge, Justice; Hon. Wm. M. Morgan, Justice, and the officers of the court, when the following proceedings were had, towit:

No. 2659.

STATE OF IDAHO, Respondent,
vs.
SECUNDINO OMAECHEVARRIA, Appellant.

In the above entitled cause, upon application of attorneys for defendant, it is ordered that a stay of twenty days be granted before remittitur is sent from this court to the lower court.

95 BOISE, IDAHO, October 30, 1915.

SUPREME COURT,
State of Idaho, ss:

Court met pursuant to adjournment.

Present: Hon. Isaac N. Sullivan, Chief Justice; Hon. Alfred Budge, Justice; Hon. Wm. M. Morgan, Justice, and the officers of the court, when the following proceedings were had, towit:

No. 2659.

STATE OF IDAHO, Respondent,
vs.
SECUNDINO OMAECHEVARRIA, Appellant.

A petition for rehearing having been heretofore filed in this cause on behalf of appellant, and the court having fully considered the same, now on this day the cause was again called, and it was ordered that said petition for rehearing be and the same hereby is denied. It is further ordered, upon the application of S. L. Hodgin, on behalf of appellant, that the sending down of the remittitur in this case be stayed pending the filing and approval of a bond on appeal from the judgment of this court to the Supreme Court of the United States.

96 In the Supreme Court of the State of Idaho, September, 1915, Term.

Filed Oct. 5, 1915. T. W. Hart, Clerk.

STATE OF IDAHO, Respondent,
vs.
SECUNDINO OMAECHEVVIARIA, Appellant.

Penal statutes—Definiteness of terms—Language of Sec. 6872, Rev. Codes, sufficiently definite and certain.

1. This is a companion case to that of State v. Horn et al., — Ida., —, and the conclusions reached by this court in that case are decisive of all but one of the questions raised in the case at bar, viz.: the uncertainty of sec. 6872, Rev. Codes, and consequently its unconstitutionality as a criminal statute.

2. Where a statute has been in force for many years receiving a practical interpretation and accepted in all its terms, the most careful consideration should be given questions involved in its interpretation if it then be attacked as conflicting with the constitution; as, unless its language is so obscure and doubtful as to entitle it to no weight or consideration, the long-accepted, practical interpretation is more likely to be right than a newly discovered one suggested by the exigencies of current litigation.

3. Held, that sec. 6872, Rev. Codes, which was enacted by the 12th session of the territorial legislature in 1883, reenacted as sec. 6872, Rev. Stat., of 1887, and continued in force by sec. 2 of the
97 schedule and ordinance contained in article 21 of the state constitution, approved by the federal government at the time Idaho was admitted to the Union, is couched in sufficiently definite language to meet the object sought to be attained.

4. Where there are two constructions that may be fairly given a legislative act designed to effect a great public purpose; one of which will carry out the intent and purpose and the other will defeat the intent and purpose of the act, the former construction should be applied.

5. Laws are enacted to be read and obeyed by the people, and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey and uphold them.

6. A cattle range in this state has a well-defined meaning, and so has a sheep range; and this meaning is fully recognized by persons engaged in the two industries.

7. Sec. 6872, Rev. Codes, is a police regulation and must necessarily be construed with, and as a part of sec. 6314, Rev. Codes, which provides: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence." In other words there must be an intent to violate sec. 6872, Rev. Codes, supra, as well as the act of driving or herding sheep upon a cattle range, in order to warrant a conviction of the deefndant.

98 Appeal from the District Court of the Third Judicial District in and for Owyhee County.

Hon. Carl A. Davis, Judge.

Criminal Prosecution for Herding, Grazing, and Pasturing Sheep upon a Cattle Range, in Violation of Sec. 6872, Rev. Codes.

Judgment for Plaintiff, Affirmed.

Oppenheim & Hodgin, for appellant.

J. H. Peterson, Attorney General; T. C. Coffin, Asst. Attorney General; Russell G. Adams, Prosecuting Attorney; Wm. Healy, for Respondent.

L. B. Green, Solon Orr, B. S. Crow, K. I. Perky, Amici Curiæ.

99 BUDGE, *J:*

This prosecution was brought in the probate court of Owyhee county, against defendant, charging him with the commission of a misdemeanor, to wit, herding, grazing and pasturing sheep upon a cattle range in violation of sec. 6872, Rev. Codes.

The case was tried before the court without a jury, a jury trial hav-

ing been waived, and judgment was pronounced against defendant finding him guilty as charged.

An appeal was taken to the district court of the Third Judicial District in and for Owyhee County from said judgment.

After a demurrer to the complaint had been overruled the cause was tried before the court and a jury and a verdict returned finding the defendant guilty as charged in the complaint.

Judgment was pronounced in accordance with the verdict and it was further ordered that judgment be staid pending appeal to this court and that bond in the sum of $500 be furnished pending said appeal.

Thereafter, defendant filed his motion for a new trial, which was denied by order of the court, and an appeal was taken to this court both from the judgment and from the order denying defendant's motion for a new trial.

This is a companion case to that of State v. Horn, — Ida., —, and the conclusions reached by this court in that case are decisive of all but one of the questions reaised in the case at bar.

In the case at bar counsel for appellant raise an additional question, namely, the uncertainty of sec. 6872, Rev. Codes, supra, and consequently, its unconstitutionality as a criminal statute. They contend that the statute is vague, indefinite and uncertain, in that it fails to define a cattle range; that it provides no means of determining the character of the range, fixing the exterior boundaries thereof or marking out said boundaries upon the ground; and that it is arbitrary—leaving the determination of the above facts to the arbitrary action of the person or persons claiming adversely to appellant.

The statute in question provides: "Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

This statute was enacted by the 12th session of the territorial legislature in 1883. It was part of an act entitled "An Act for the protection of stock growers in Owyhee, Boise, Oneida, Bear Lake, Lemhi, and Custer Counties." It was reenacted as sec. 6872, Rev. Stat., of 1887. The statute was continued in force by sec. 2 of the schedule and ordinance contained in art. 21 of the state constitution; and the state constitution, together with the schedule, was approved by the federal government at the time Idaho was admitted as a state.

While it is true this section of the statutes has never been before this court for construction, yet it has been for thirty-two years accepted to a greater or less extent by the industries of the state affected thereby. The terms of the statute, by reason of the fact that it has been part of the law of this state during all these years, have

a well-defined meaning. The fact that a statute has been in force for many years, and, the presumpton is, obeyed by the citizens of the state, and received a practical interpretation, unless its
101 language is so obscure and doubtful that it is entitled to no weight or consideration, may be urged as an additional reason why the most careful consideration should be given to the questions involved in its interpretation and application where it is contended that it is in conflict with the constitution.

It has been said by respectable authority that a construction of a statute which has for a third of a century been accepted by everyone as so obviously correct as never to have been questioned is much more likely to be right than a newly discovered one suggested by the emergencies of current litigation. (Willis v. Mabon, 48 Minn., 140, 50 N. W. 1110, 16 L. R. A. 281.) This principle has been applied in upholding statutes the constitutionality of which was not attacked until after sixty years, fifty years, forty-five years, forty years, thirty years, and even twenty years. (McPherson v. Secretary of State, 92 Mich. 377, 52 N. W. 469; Hill v. Tohill, 225 Ill., 384, 80 N. E. 253; Butte City Water Co. v. Baker, 196 U. S. 119, 25 Sup. Ct., 211, 72 Pac. 617.)

Courts approach constitutional questions with great deliberation, exercising their power in this respect with the greatest possible caution and even reluctance, and should never declare a statute void unless its invalidity is, in their judgment, beyond a reasonable doubt. (State v. Pioneer Nurseries Co., 26 Ida., 332.)

So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed. (United States ex rel. Atty. Gen. v. Delaware & H. Co., 213 U. S. 366.)

There is also an established rule of statutory construction that where there are two constructions that may be fairly given a legislative act designed to affect a great public purpose; one of which will carry out the intent and purpose, and the other will defeat
102 the intent and purpose of the act, the former construction should be applied. (Imperial Irr. Co. v. Jayne, 138 S. W. 575, at p. 582.)

In the case of Adams v. Lansdon, 18 Ida., 483, the following language is used by this court:

"Laws are enacted to be read and obeyed by the people, and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey and uphold them."

In the case of State v. Stuth, (Wash.) 39 Pac., 655, a penal statute providing that every person who disturbs any religious society, when meeting together in public worship, shall be fined, was attacked on the ground that it was invalid for uncertainty in that it failed sufficiently to define the crime. It was held that the statute was not uncertain, the words "disturb" and "religious society" being used in their ordinary sense.

In Foster v. State, 21 Tex. App., 80, at p. 87, the court had under

consideration a similar statute. It was objected in that case that the range was not set out or described in the indictment. It was held that the term "range" as used in the statute is a matter of local description, and unlike a generic term requiring the species to be stated, it admits of proof under the general allegation, without defining by averment the limits of the range.

See also case of Fox v. State of Washington, U. S. Advance Opinions No. 9, April 1, 1915, p. 383.

The word "range" is defined in the Century Dictionary and Cyclopedia p. 4955, subdiv. 7, as "A tract or district of land within which domestic animals in large numbers range for subsistence; an extensive grazing-ground; used on the great plains of the United States for a tract commonly of many square miles, occupied
103 by one or by different proprietors, and distinctively called a cattle-, stock-, or sheep-range. The animals on a range are usually left to take care of themselves during the whole year without shelter, excepting when periodically gathered in a 'round up' for counting and selection, and for branding when the herds of several proprietors run together."

A cattle range in this state has a well-defined meaning, and so has a sheep range; and this meaning is fully recognized by persons engaged in the two industries.

While it might be possible for sheep to graze upon a cattle range, it is well known to all stock growers that sheep and cattle will not range together, and that cattle and horses will not range on a sheep range. Thus legislation to protect sheep against cattle and horses is wholly unnecessary.

It is also well known to stock growers that cattle and horses have their accustomed range, to which they go, if permitted, of their own volition, and upon which they range, and where they can be found by the owners.

It is a matter of common knowledge that horses and cattle are left upon a cattle range receiving but little care and attention during the summer months by their owners; while sheep are constantly under the care of herders and dogs. Moreover that a camp tender is employed in connection with the care and herding of sheep, among whose duties is the riding of the range for the purpose of locating suitable area upon which to drive, herd and graze the sheep of his employer.

Sheep require much less water while grazing than cattle, and it therefore becomes necessary for cattle and horse owners to occupy portions of the public domain upon which there are streams and springs of water to which their animals may have ready access.

The above are all very good reasons why it is imperative
104 that the public domain within the jurisdiction of the state be properly regulated as between these two necessary and needful industries. Sec. 6872, Rev. Codes, is a police regulation, and to our minds it clearly appears that it was the intention of the legislature, in the enactment of said section, to preserve the tranquil-ity of the citizens of the state; to avoid "range wars;" and to promote the peace, quiet and general welfare of the citizens.

This statute must necessarily be construed with, and as a part of, sec. 6314, Rev. Codes, which latter section provides: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence." In other words, there must be an intent to violate said sec. 6872, supra, as well as the act of driving or herding sheep upon a cattle range; or the failure upon the part of the defendant by the exercise of ordinary diligence to ascertain whether or not the range upon which he drives, herds and grazes his sheep is a cattle range within the meaning of said section.

The appellant insists in his argument that sec. 6872, Rev. Codes, is void because it fails to describe the exterior limits of a cattle range, and for that reason it is impossible for a citizen herding sheep to determine when he has crossed the exterior limits of the cattle range.

The statute says: "the priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range." Priority of possession, or priority of right, or the first in time is the first in right, are all common, ordinary, every-day expressions and have a well-defined meaning. The priority of right to the use of the range as between cattle and sheep owners depends upon the prior use in the usual and customary manner. Thus, if the range is used by cattle owners and has been so constantly
105 used prior to its use by sheep owners, the right to the use is established by proof of such priority.

Where the owner of sheep knows, or by the exercise of ordinary care is able to ascertain, that a certain given area of the public domain has been used and is then being used as a cattle range, and he wilfully and knowingly herds, drives and grazes his sheep upon such cattle range, it then becomes his wilful and unlawful act or trespass and he is clearly amenable to the statute.

These being questions of fact, are for the jury to determine, the same as would be the questions of fact in any other ordinary criminal prosecution. The intention to commit the act, as well as the commission of the act are necessary and essential ingredients of the crime; and if both are established by competent evidence, under proper instructions, such as from our examination were given in this case, in our opinion the verdict of the jury should not be disturbed.

We think we have disposed of the question that a cattle grower can arbitrarily fix the limits or boundaries of the range. Both the limits and boundaries of the range are determined by priority of possession and use of the range by the cattle grower in the usual and customary use of a cattle range, and are questions of fact for the jury. The cattle grower can neither enlarge nor diminish the area at will; but must establish by competent evidence and beyond a reasonable doubt that the defendant in charge of the sheep wilfully and unlawfully herded, grazed or pastured them upon a cattle range, as heretofore defined; that said range had been previously occupied by cattle, or was occupied by cattle growers either as a spring, summer or winter range for their cattle, and that they, or their predecessors in the cattle business, had made the usual and

customary use of such area of country as a cattle range, prior
106 to any use thereof, in the usual and customary manner, as a sheep range, and that said range had not been abandoned as a cattle range; and that the defendant knew, or had information from which a reasonable man under like circumstances would have known, that he was herding, grazing or pasturing sheep upon a cattle range previously occupied by cattle in the usual and customary use of such range, and that sheep had not been herded, grazed or pastured upon said range prior to said time in the usual and customary use of said range.

The character and area of a cattle range are to be determined by its priority of use in the usual and customary manner as such.

We agree with learned counsel for appellant and those who appeared as amici curiæ that all criminal statutes should be certain and definite in their terms, and commend the zeal and effort displayed by counsel in behalf of the appellant in their presentation of this case. And we are frank to admit that sec. 6872, Rev. Codes, is not as certain and definite in its terms as are the more recent statutes covering the polico power. However, we have reached the conclusion that in view of the peculiar conditions existing in this state prior to the enactment of that statute (as recited in the various opinions of this court and referred to in the case of State v. Horn, supra), occasioned by a sharp conflict between the sheep and cattle industries and between the sheep and farming industries, it was properly deemed necessary by the legislature, in order to promote the general welfare, peace, quiet and tranquil-ity of the citizens, to enact such a statutory provision regulating the use of the public domain within the jurisdiction of the state.

From the conclusions we have reached, we are of the opinion that sec. 6872, Rev. Codes, is not void for indefiniteness and uncertainty, and that it does not permit the cattle grower to arbitrarily fix the limits or boundaries of the cattle range. Whatever hard-
107 ships, if any are imposed upon either the stock or sheep industry by reason of this law are to be remedied by the legislative and not the judicial branch of our state government.

The judgment of the lower court is affirmed.

Sullivan, C. J. and Morgan, J., concur.

108 Filed Oct. 5, 1915. I. W. Hart, Clerk.

In the Supreme Court of the State of Idaho, September, 1915, Term.

STATE OF IDAHO, Appellant,
vs.
S. F. HORN, JOHN EILER, and JOHN CALVIN, Respondents.

Constitutionality of Sec. 6872, Rev. Codes, Affirmed—Exercise of Police Power of State on Public Domain Within State—Regulation of Sheep and Cattle Industries—Legislative Prerogative to Exercise Police Power of State.

1. The owners of sheep, equally with all other citizens of the state, are entitled to the use of the public domain within the jurisdiction of the state, subject to the right of the state in the exercise of its police power to control and regulate such use.

2. The control and regulation of the various industries of the state under a proper exercise of the police power rests with the legislative department of the state government, and it is only against a palpable abuse of the power that the courts may interpose. If, in the judgment of the legislature, and in order to protect the public health, public morals or public safety, or to enhance the general prosperity of the citizens, any particular industry requires protection or regulation upon the public domain within the state, such protection or regulation may be afforded by a proper legislative enactment.

3. It is within the constitutional prerogative of the legis-
109 lature, in the exercise of the police power of the state, to minimize the opportunities for conflict between the sheep and cattle industries, to the extent of prohibiting sheep from running "on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle," as provided in sec. 6872, Rev. Codes.

4. The lands constituting the public domain of the United States within the jurisdiction of this state are subject to the police regulations of the state, as expressed in legislative enactments, the same as the lands of any citizen of the state, so far as such laws and regulations are not in conflict with the federal constitution or statutes; and until congress provides by law that sheep shall not be restricted by state laws from grazing anywhere upon the public domain, the state, by proper legislation, may regulate and control that matter.

5. Individuals engaged in the sheep industry are not entitled to claim that the same legislative restrictions and privileges be applied to that industry as to rival industries, such as the horse or cattle industry. The habits and nature of these animals being different, as well as the results which follow from their use of land for grazing purposes, it is competent for the legislature to take these differences into consideration and to provide for them by regulations designed to meet existing conditions in each particular industry. When the law under consideration treats all individuals of the class of sheep men alike under similar circumstances and conditions, both as regards the privileges conferred and the liabilities imposed, it is not class or special legislation, and is not obnoxious to the provisions of sec. 1, art. 1 of the state constitution which enumerates, among the inalienable rights of the citizens, the "acquiring, possess-
110 ing and protecting property."

6. The equality clause of the federal constitution as embodied in the 14th amendment, is not necessarily infringed by legislative classification of persons or things. This clause only requires that the same means and methods be applied impartially to

all the constituents of a class, so that the law may operate equally and uniformly upon all persons in similar circumstances.

Appeal from the District Court of the Sixth Judicial District, in and for Custer County.
Honorable J. M. Stevens, Judge.

Criminal prosecution for herding and grazing sheep on cattle range in violation of sec. 6872, Rev. Codes. Judgment for defendant.
Reversed.

J. H. Peterson, Attorney General.
T. C. Coffin, Ass't " "
J. J. Guheen, " " "
E. G. Davis, " " "
A. J. Higgins, Prosecuting Attorney.
W. W. Adamson,
For Appellant.
J. M. Stevens, F. J. Cowen, C. R. Clute, Geo. E. Keyes, For Respondents.
L. B. Green, Solon Orr, B. S. Crow, K. I. Perky, Amici Curiæ.

111 BUDGE, *J.:*

The defendants in this case were informed against in the justice court of Challis precinct, Custer county, and charged with herding and grazing about 2,000 sheep on a cattle range previously occupied as a spring and fall range belonging to divers persons; such persons by the usual and customary use of such range as a cattle range, having possessory right thereto as against sheep.

This action was prosecuted under sec. 6872, Rev. Codes, which provides that "Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

The defendants were tried before a jury in the justice court and found guilty, and sentenced to pay a fine. From such conviction and judgment they appealed to the district court of the Sixth Judicial District. In due time said cause came on regularly for trial before the court and jury.

At the conclusion of the evidence offered on behalf of the state, the following motion was interposed by the attorneys for the defendants:

"We move that a peremptory instruction be given to the jury to discharge the defendants or to return a verdict of not guilty and

that the defendants be discharged for the reasons given in our first objection to any testimony being given in this case whatever, namely:

"That the complaint does not state facts sufficient to con-
112 stitute a criminal offense against the laws of the State of Idaho.

"That the Section of the Statute upon which this prosecution is attempted is unconstitutional as an improper attempt by the legislature to control or give preference rights in and to portions of the public domain of the United States within the jurisdiction of this State.

"That it is class legislation and that the legislature has no power or control over the public domain as the jurisdiction and control of the same rests entirely within the Congress of the United States and this action is not prosecuted under any law of the United States."

The trial court granted said motion, and dismissed the jury, rendering a final judgment against the state; to which ruling and judgment of the court the state duly excepted. This is an appeal from the order and judgment so made and entered by the district court.

In passing we might suggest that the trial court undoubtedly inadvertently overlooked sec. 7877, Rev. Codes, when the motion was entertained to instruct the jury to discharge the defendants or to return a verdict of not guilty, and in excusing the jury from the further consideration of the cause and discharging the defendants. Said sec. 7877, Rev. Codes, provides: "If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant. But the jury are not bound by the advice." However, at the suggestion of counsel for the state, we will ignore this error and proceed to a determination of this case as though no such error had occurred.

The range in question is a strip of public domain about three and one-half miles wide by five miles long, located in Pahsimaroi valley, and is bordered on one side by a chain of farms owned by cattle men and farmers, and on the other side by the Lemhi Forest
113 Reserve. It appears from the evidence in this case that the farmers and ranchers range their cattle within the boundary lines of said range during the spring and fall, prior to ranging them upon the Lemhi Forest Reserve, and again in the fall, when the cattle are driven from the forest reserve by reason of storms and prior to the time when the cattle are fed in the early winter or late fall.

It was conceded upon the oral argument of this case that if sec. 6872, Rev. Codes, supra, is constitutional the complaint is sufficient.

Counsel for respondent insist that this section is unconstitutional for the following reasons: First, that it is in direct contravention of sec. 1, art. 1 of the constitution of Idaho; second, that it is an encroachment upon the powers of the general government in that it attempts to give the state control over the public domain and the natural products thereof; third, it is not a proper police reglation, in that it has no real or substantial relation to the public health,

public morals or public safety; it arbitrarily interferes with a private business, and imposes unusual and unnecessary restrictions upon a lawful business; fourth, it is in direct violation of the fourteenth amendment of the constitution of the United States, in that it is class legislation of the most vicious character, denying to the respondent equality of rights.

We are unable to reach the conclusion that the section of the statutes under consideration is in contravention of sec. 1, art 1 of the constitution, which provides that "All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety." The effect of said sec. 6872, Rev. Codes, respondents contend, is to deprive them of the right to acquire, possess or protect their
114 property. But we fail to see how such a construction could be placed upon this section. They surely would not be deprived of this right by reason of being prohibited from herding, grazing or pasturing, or permitting or suffering their sheep to be herded, grazed or pastured upon the public domain previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle.

The public domain is not the property of the respondents, but of the United States. The respondents have an equal right with all other citizens of the state to the use of this public domain within the jurisdiction of the state, subject to the right of the state to control and regulate such use. The state has an interest in the enjoyment of the right to the use of the public domain that is paramount to that of its citizens and may, in the exercise of its police power, for the general well-being and to promote the public health, the public morals or the public safety, regulate and control the use of the public domain within the confines of the state; which control and regulation rests with the legislative department, and it is only against the abuse of this power that the courts may interpose.

If, in the wisdom of the legislature, and in order to protect the public health, the public morals or the public safety, or to enhance the general prosperity of the citizens, any particular industry requires protection or regulation upon the public domain within the state, such protection or regulation may be afforded by proper legislative enactment. (Bacon v. Walker, 204 U. S., 309, 51 L. ed. 499.)

As we deem the third question raised by counsel for respondents—the constitutionality of sec. 6872, Rev. Codes, as a police regulation—to be closely related to the question just disposed of,
115 we will consider it next in order.

The right of the state, under its police power, to regulate the running at large of live stock has been so frequently determined by this court, that it would be a useless repetition to reiterate the principles of law expressed in the various decisions upon that subject. They will be found in the cases of Sifers v. Johnson, 7 Ida., 798; Sweet v. Ballentyne, 8 Ida., 431; Spencer v. Morgan, 10 Ida., 542, and cases therein cited. And if it is within the police power of the state to regulate the running at large of live stock, and to

prohibit certain animals from running at large, such, for instance, as hogs, or other animals which, from their nature or condition, might be deemed to be injurious or detrimental to the stock industry, it would of necessity lie within that power to restrict the herding or grazing of sheep upon the public domain within certain months of the year, or to absolutely prohibit the herding or grazing of sheep upon any part or portion of the public domain within the limits of the state.

In the case of Sifers v. Johnson, supra, this court said: "The police power of the state is very great. Under it many things may be done which at first glance seem to infringe upon natural and civil rights. The protection of health, prevention and suppression of nuisances, controlling the conduct of business which affects others not engaged in the same, the preservation of the public peace and protection of the public welfare are legitimate subjects calling for the exercise of the police power of the state."

Judge Cooley, in his work upon Constitutional Limitations sixth edition, at page 743, says: "The most proper business may be regulated to prevent its becoming offensive to the public sense of decency, or for any other reason injurious or dangerous."

In his work upon State and Federal Control of Persons
116 and Property Mr. Tiedeman, at page 838, says: "In every state the keeping of livestock is under police regulation. * * * The clash of interest between stock raising and farming calls for the interference of the state by the institution of police regulations; and whether the regulations shall subordinate the stock-raising interest to that of farming, or vice versa, in the case of an irreconcilable difference, as is the case with respect to the going at large of cattle, is a matter for the legislative discretion, and is not a judical question. In the exercise of this general power of control over the keeping of livestock, the state * * * may prohibit altogether the running at large of such animals, and compel the owners to keep them within their own incolsures."

In the case of C. B. & Q. R. R. Co., v. Illinois, 26 Sup. Ct. Rep. 341, we find the following statement: "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promite the public health, the public morals, or the public safety. * * * And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose."

The clash between the sheep industry and the cattle industry, and between the sheep and farming industry, is a part of the history of this state; and the enforcement of certain police regulations has resulted in minimizing a conflict that was detrimental in the extreme to all three of these legitimate and necessary industries. The differences between these industries while minimized, still exist

in many portions of the state. This unfortunate condition
117 is not one that has existed only during the settlement of this country, but was regulated and controlled under the common law of England, where the clash was between the sheep men and the tiller of the soil.

During the reign of Henry the VIII, in the sixteenth century (Froud's History of England), there was a sharp conflict between the sheep industry and the farmer that resulted in more drastic legislation than has been enacted by the legislature of this state upon that question. By reason of the absence of, or failure to enforce, proper police regulations looking to the control of the public domain at the time referred to, it became almost impossible for the farming communities to maintain themselves, due to the rapid growth of the sheep and cattle industries. Farms were forsaken, and the entire country depopulated as a result of the unlimited number of sheep which were owned by a few, comparatively speaking, of the people residing in the British Isles. It became necessary for the sheep owners, in order to properly provide range for their vast herds, to acquire all of the lands that could be obtained and to monopolize the public domain for the purpose of securing feed for their flocks. Conditions became so bad that an act was passed by parli-ment wherein it was provided:

"Whereas, divers and sundry persons of the king's subjects of this Realm, to whom God of his goodness hath disposed great plenty and abundance of movable substance, now of late, within few years, have daily studied, practised, and invented ways and means how they might accumulate and gather together into few hands, as well great multitude of farms as great plenty of cattle, and in especial, sheep, putting such lands as they can get to pasture and not to tillage: whereby they * * * keep in their hands such great portions and parts of the lands of this Realm from the occupying of the poor husbandmen, and so to use it in pasture and not
118 in tillage, is the great profit that cometh of sheep * * * it is hereby enacted, that no person shall have or keep on lands not their own inheritance more than 2000 sheep * * *"

This act was considered as a necessary police regulation and enacted for the purpose of protecting the farmers against an industry that in and of itself was legitimate and had become an integral part of the development of the country and entitled to legitimate encouragement. But as in that day, so in this, it has become necessary to subordinate one of two industries to avoid a condition that the legislature in its wisdom has said might be seriously detrimental to the welfare of the people.

It has been held by this court repeatedly that it is within the discretion of the legislature to subordinate the sheep industry to that of farming or vice versa. The legislature of this state in what is commonly known as the "Two Mile Limit Law," has declared that the sheep industry shall be subordinate to that of farming. If this should work a hardship to that industry, it is in the legislature and not the courts that relief must be sought. This court has said that the legislature in subordinating the sheep in-

dustry to that of farming did so for the express purpose of protecting the peace, quiet and comfort of the small farmers of the state. (Sweet v. Ballentyne, 8 Ida., 431.)

And by analogy, it would seem that if it is within the power of the legislature as a police regulation to subordinate the sheep industry to that of farming, it must also be within the power of that body to subordinate the sheep industry to the cattle industry to the extent of prohibiting sheep from running "on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle."

We will now consider the second proposition of respondents,
119 viz.: that the legislature of the state by this act is encroaching upon the powers of the general government by exercising control over the public domain and the natural products thereof.

In the case of Sweet v. Ballentyne, 8 Ida., 431, (on rehearing, at p. 451) this court held that "So far as the public domain of the United States, in this state, is concerned, it is under the police regulations of the state, and governed thereby, the same as the lands of the citizen, wherein such laws or regulations are not in conflict with the federal constitution, or the laws of Congress, and, until Congress provides by law that sheep shall not be restricted by state laws from grazing everywhere upon the public domain, the state, by proper legislation, may regulate and control that matter."

In support of their contention, counsel for respondents direct our attention to an act of congress of February 25, 1885, [23 Stat. at L. 321] prohibiting the unlawful occupancy of public lands. That act, however, is not in conflict with the opinions of this court in the cases of Sifers v. Johnson, Sweet v. Ballentyne and Spencer v. Morgan, supra, and has no application to the case at bar.

That act was passed for the purpose of prohibiting the unlawful fencing of the public domain of the United States, and was directed against persons and corporations who, at the time of its passage, had fenced and were engaged in the fencing of large areas of the public domain by enclosing the same with barb wire, and thereby preventing the use of the public domain by the citizens of the United States as a whole; and retarding the settlement of the public domain by individual citizens who sought to permanently establish their homes thereon. The object that congress had in view was to prohibit the monopoly by a few individuals of the public domain
120 of the United States which, as before stated, is not in conflict with the statutes of this state or the decisions of this court, but is strictly in accord with the policy pursued by our legislature in regulating the right to the use of the public domain by the sheep, cattle and farming industries.

In their fourth contention counsel for respondents maintain that sec. 6872, Rev. Codes, is in direct violation of the fourteenth amendment to the United States constitution, in that it is class legislation, denying to the respondents equality of rights. We are unable to see any merit in this contention.

It is well settled that a law is not special in character "if all persons subject to it are treated alike, under simillar circumstances and

conditions, in respect both of the privileges conferred and liabilities imposed." (Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.) In the case of Sweet v. Ballentyne, supra, at page 448, it was said: "It cannot be seriously contended that said law [Two Mile Limit Law] is class legislation because it does not include cattle and horses, as well as sheep, as the habits and nature of the animals, their effects on the land on which they graze, are not the same. However, the law under consideration treats all sheep-men alike, under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed, and is, for that reason, not class legislation—no more than the law not requiring one to fence against hogs is class legislation against the hog grower; nor does that deny him equal protection under the law. The statute in question affords the same protection to the sheep raiser as it does to other citizens * * * That statute is general in its terms, and affords protection for all and to all alike."

The equality clause of the federal constitution is not necessarily infringed by special legislation or by legislative classification of persons or things. This clause only requires that the same means and methods be applied impartially to all the constituents of a class so that the law may operate equally and uniformly upon all persons in similar circumstances. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions (Central Lumber Co., v. S. Dakota, 226 U. S. 157, 26 L. R. A. (N. S.) 799.) It is a rule that a statute relating to persons or things as a class is a general law, but that one relating to particular persons or things of a class is special. (State v. Walsh, 136 Mo., 400, 35 L. R. A. 231.)

We are of the opinion that the statute under consideration is not an arbitrary discrimination between sheep and other classes of stock or that it is class or special legislation, because it embraces all classes subject to such legislation under like circumstances and conditions.

Sec. 6872, Rev. Codes, is a police regulation and was enacted by the legislature to promote the peace, safety and general welfare of the citizens of the state, and that being true, we doubt the applicability of the fourteenth amendment of the United States constitution to the case under consideration.

It was said in the case of Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, a case similar in principle to the one here under consideration: "But neither the Amendment, [14th Amendment to United States Constitution] broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts * * *. Special burdens are often necessary for general benefits, * * * Regulations for these

purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carryng out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.

"* * * The inconvenience arising in the administration of laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State."

In the case of Minn. & St. Louis Ry. Co. v. Beckwith, 129 U. S. 29, the court used this language: "But the clause [sec. 1, 14th amendment to United States Constitution] does not limit, nor was it designed to limit the subjects upon which the police power of the State may be exerted * * * The nature and extent of such legislation will necessarily depend upon the judgment of the Legislature as to the security needed by society."

It may be stated, as a general proposition, that a statute must clearly appear to be unreasonable and arbitrary before the courts are justified in interfering; and that the necessity and desirability of laws of this character are very largely matters to be determined by the legislature. (Minn. & St. Louis R. R. Co. v. Beckwith, and Bacon v. Walker, supra.)

In holding sec. 6872, Rev. Codes, unconstitutional upon the
123 grounds and for the reasons assigned by the respondent in this case, it would be incumbent upon this court to hold contrary to the principles of law announced in the cases of Silfers v. Johnson, Sweet v. Ballentyne, Spencer v. Morgan and Bacon v. Walker, supra. Should we do that, it would unsettle the policy of this state which has been fixed for so many years by these decisions, and which is intended to promote the peace, safety and general welfare of the citizens of this commonwealth by the exercise of the police power of the state in the regulation of the right to the use of the public domain by the sheep, cattle and farming industries.

We have therefore reached the conclusion that sec. 6872, Rev. Codes, is not in contravention of sec. 1, art. 1 of the constitution of this state; that it is not an encroachment upon the powers of the general government; that it is a proper police regulation enacted by the legislature for the express purpose of protecting the public peace, public safety, and promoting the general welfare of the citizens, and does not arbitrarily interfere with a private business or impose upon such business unusual and unnecessary restriction; and that it is not in direct violation of the fourteenth amendment to the constitution of the United States.

It follows from the conclusions of the court as heretofore expressed in this opinion that the trial court erred in sustaining the motion of

the respondents and in discharging the defendants and entering up judgment against the state. The judgment is reversed.

Sullivan, C. J. and Morgan, J., concur.

124 In the Supreme Court of the State of Idaho.

STATE OF IDAHO, Plaintiff,
vs.
SECUNDINO OMAECHEVARRIA, Defendant.

Certificate of the Court.

On motion of the plaintiff in error, Secundino Omaechevarria, this court orders it to be certified and made a part of the record in this case, and the Honorable Isaac N. Sullivan, Chief Justice of Said Supreme Court does now certify that the case of the State of Idaho vs. Horn, et al., was a companion case to the case of the State of Idaho vs. Secundino Omaechevarria. That in each of said cases there was drawn in question the validity of Sec. 6872 of the Revised Codes of the State of Idaho, on the grounds,

That said section is in contravention of Sec. 1 of the fourteenth amendment to the constitution of the United States, in that it deprives the defendant of property without due process of law, in that it denies the defendant the equal protection of the law and abridges the privileges and immunities of citizens and especially of this defendant, and in that it is class legislation.

That it is in contravention of the laws of the United States of America in that it contravenes the Act of Congress of February 25th, 1885 (23 U. S. Statutes at Large, page 321) in this: that said act declares the assertion of the right to the exclusive possession and occupancy of any part of the lands of the United States without claim color or title or asserted right as therein specified to be unlawful.

That the record before the court disclosed that the above questions were raised in the trial courts on Demurrer, on objection to
125 the introduction of any testimony, motions for instructed verdicts, and in State vs. Omaechevarria, by exceptions to the refusal of the trial court to give instructions requested by the defendant, and on motion for a new trial.

That said questions were raised in the briefs of respective counsel and relied upon in the oral arguments.

That in order to render a final decision in either of said cases it was necessary for the court to pass upon the Federal questions raised, that this court did pass upon said questions and decided them against the rights, privileges and immunities claimed by the plaintiff in error under Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and the Act of Congress of February 25th, 1885, (23 Statutes at Large, Page 321) and in favor of the validity of said Sec. 6872.

That these cases were heard together and the opinions of the court were filed on the same date, that the court wrote the principal opinion

in the Horn case. That the questions decided in that case were decisive of all but one of the questions raised in the other case, viz: the uncertainty of Sec. 6872, Revised Codes.

That when the court used the following language in its opinion in the case at bar "This is a companion case to that of State v. Horn,—Ida.,—, and the conclusions reached by this court in that case are decisive of all but one of the questions raised in the case at bar." It intended to and did adopt its opinion in the Horn case as a part of its decision in this case.

Dated this 28th day of December, 1915.

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of the State of Idaho.

Attest.

[Seal of Supreme Court, State of Idaho.]

I. W. HART, Clerk.

125½ [Endorsed:] No. 2659. In the Supreme Court of the United States. State of Idaho, Plaintiff, vs. Secundino Omaechevarria, Defendant. Certificate of the Court. Filed Dec. 28" 1915, at — o'clock M. I. W. Hart, Clerk, by E. S. David, Deputy Clerk. Oppenheim & Hodgin, Lawyers, 602-3-4 Idaho Bldg., Boise, Idaho, Attorneys for —.

126 In the Supreme Court of the State of Idaho.

STATE OF IDAHO, Respondent,
v.
SECUNDINO OMAECHEVARRIA, Appellant.

Application for Rehearing.

Comes now the appellant, Secundino Omaechevarria, and respectfully applies for a rehearing, upon the following grounds, towit:

1. That the court reached an erroneous conclusion with reference to the questions raised by appellant in his brief.

2. That the court's conclusion that Section 6872 of the Revised Codes of Idaho is not in conflict with Section 1, Article 1 of the Constitution of the State of Idaho is erroneous.

3. That the court's conclusion that Section 6872 of the Revised Codes of Idaho is not in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States is also erroneous.

4. That the court's conclusion that Section 6872 of the Revised Codes of Idaho is not in conflict with the Act of Congress of February 25, 1885, (23 Stat. L. 321), is erroneous.

127 5. That the court, in arriving at its conclusion, inadvertently overlooked the salient facts in the record which appellant believes were determinative to the questions raised; that is to say, on page 10 of the opinion, last paragraph, the court says:

"Both the limits and boundaries of the range are determined by

priority of possession and use of the range by the cattle grower in the usual and customary use of a cattle range * * * "

While the undisputed facts in the record show that the cattle men named in the complaint first established the boundary lines of the range in question about twelve years ago; that, just prior to the arrest of the defendant, they discussed and agreed upon the boundary lines of the range; that they erected no monuments or put up notices marking the boundaries; and that, in order that the sheep men might know the location of the lines, it was necessary for some one to notify each man as he approached the lines with his sheep.

On page 8 of the opinion, third paragraph, the court says:

"While it might be possible for sheep to graze upon a cattle range, it is well known to all stock growers that sheep and cattle will not range together, and that cattle and horses will not range on a sheep range. Thus, legislation to protect sheep against cattle and horses is wholly unnecessary."

While the facts in the record show that, if they are properly handled, cattle and sheep may run on the same range, and that, under certain conditions, cattle will drive sheep off the range.

6. That the court overlooked or disregarded a decision of this court upon the section of the statute under consideration, to wit:

McGinnis et al., vs. Friedman, 2 Idaho 393, 17 Pac. 635,
128 wherein this court had under consideration Section 6872 in connection with the Act of Congress of February 25, 1885.

In the case of State of Idaho vs. S. F. Horn, et al., page 12 of the opinion, last paragraph, the court, in referring to the Act of Congress of February 25, 1885, said:

"That act was passed for the purpose of prohibiting the unlawful fencing of the public domain of the United States, and was directed against persons and corporations who, at the time of its passage, had fenced and were engaged in the fencing of large areas of the public domain by enclosing the same with barb wire, and thereby preventing the use of the public domain by the citizens of the United States as a whole; and retarding the settlement of the public domain by individual citizens who sought to permanently establish their homes thereon * * * "

The court overlooked or disregarded one clause of Section 1 of the Act of February 25, 1885, which clause is as follows:

"And the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited."

This clause was considered by the court in connection with Sec. 6872 Revised Codes in McGinnis et al., vs. Friedman (supra).

There is drawn in question, in this action and upon this appeal, the validity of the statute of the State of Idaho herein referred to, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision of this court in this case and upon this appeal is in favor of its validity.

A brief will be filed later in support of this petition.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Appellant; Residence, Boise, Idaho.
K. I. PERKY, *R. at Boise,*
L. B. GREEN, *Mt. Home,*
WYMAN & WYMAN,
Residing at Boise.

Endorsed: Filed, Oct. 21, 1915. I. W. Hart, Clerk, by E. S. David, Deputy.

129 In the Supreme Court of the State of Idaho.

STATE OF IDAHO, Plaintiff,
v.
SECUNDINO OMAECHEVARRIA, Defendant.

Assignment of Errors.

Now comes the above defendant and files herewith his petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

The Supreme Court of Idaho erred in holding and deciding that Section 6872 of the Revised Codes of the State of Idaho was valid. The validity of said section was denied and drawn in question by the defendant on the ground of its being repugnant to the Constitution and laws of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

First. That the Supreme Court of the State of Idaho, in its decision and judgment, erred in affirming the judgment of the court below,
130 for the reason that the statute of the State of Idaho upon which the prosecution herein is based, being Section 6872 of the Revised Codes of the State of Idaho, is invalid and unconstitutional and in violation of Section one of the Fourteenth Amendment to the Constitution of the United States.

Second. That said Court erred, in holding that Section 6872 of the Revised Codes of Idaho does not abridge the privileges and immunities of citizens of the United States, and especially that of said defendant.

Third. That the said Court erred in holding that Section 6872 of the Revised Codes of Idaho does not deprive the defendant of property without due process of law.

Fourth. That the said Court erred in holding that said section does not deny to any person within the jurisdiction of the State of Idaho the equal protection of the law, and especially to the defendant.

Fifth. That the said Court erred in holding that said section is not in conflict with the Act of Congress of February 25th, 1885 (23 U. S. Statutes at Large, page 321).

For which errors the defendant, Secundino Omaechevarria, prays that the said judgment of the Supreme Court of the State of Idaho, dated October 30, 1915, be reversed and a judgment rendered in favor of the defendant and for costs.

OPPENHEIM & HODGIN,
Attorneys for the Defendant, Residing at Boise, Idaho.

130½ [Endorsed:] No. 2659. In the Supreme Court of the State of Idaho. State of Idaho, Plaintiff, vs. Secundino Omaechevarria, Defendant. Assignment of Errors. Filed Nov. 19" 1915, at — o'clock M. I. W. Hart, Clerk, by E. S. David, Deputy Clerk. Oppenheim & Hodgin, Lawyers, 602-3-4 Idaho Bldg., Boise, Idaho, Attorneys for defendant.

131 In the Supreme Court of the State of Idaho.

STATE OF IDAHO, Plaintiff,
v.
SECUNDINO OMAECHEVARRIA, Defendant.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the Supreme Court of the State of Idaho in rendering judgment against him in the above entitled case, the defendant hereby prays a writ of error, from the said decision and judgment, to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

OPPENHEIM & HODGIN,
Attorneys for Defendant,
Residing at Boise, Idaho.

Let the writ of error issue upon the execution of a bond by Secundino Omaechevarria to the State of Idaho, in the sum of Five Hundred Dollars; said bond, when approved, to act as a supersedeas.

Dated, November 19th, 1915.

ISAAC N. SULLIVAN,
Chief Justice Supreme Court of Idaho.

131½ [Endorsed:] No. 2659. In the Supreme Court of the State of Idaho. State of Idaho, Plaintiff, vs. Secundino Omaechevarria, Defendant. Petition for Writ of Error. Filed Nov. 19, 1915, at — o'clock M. I. W. Hart, Clerk, By E. S. David, Deputy Clerk. Oppenheim & Hodgin, Lawyers, 602-3-4 Idaho Bldg., Boise, Idaho, Attorneys for Defendant.

132 In the Supreme Court of the State of Idaho.

SECUNDINO OMAECHEVARRIA, Plaintiff in Error,
vs.
STATE OF IDAHO, Defendant in Error.

Bond.

Know all men by these presents, That we, Secundino Omaechevarria, of the County of Ada, State of Idaho, as principal, and R. F. Bicknell and O. F. Bacon of the County of Ada, State of Idaho, as sureties, are held and firmly bound unto the State of Idaho, in the sum of Five hundred and no/100 ($500.00) Dollars, to be paid to it, and for the payment of which well and truly to be made, we bind ourselves and each of us, our, and each of our, heirs, executors, administrators, successors, representatives and assigns, jointly and severally firmly by these presents.

Sealed with our seals, and dated this 1st day of November, 1915.

Whereas, The above named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Idaho.

133 Now, therefore, The condition of this obligation is such that, if the above named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that have been or may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

This bond to act as a supersedeas bond.

(Signed) ——— ———, *Principal.*
R. F. BICKNELL,
O. F. BACON,
Sureties.

STATE OF IDAHO,
County of Ada, ss:

R. F. Bicknell and O. F. Bacon, being each first duly sworn, depose and say: We are each of lawful age and are citizens of the State of Idaho, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Five hundred ($500.00) Dollars, over and above all debts, liabilities and exemptions.

(Signed) R. F. BICKNELL.
O. F. BACON.

Subscribed and sworn to before me this 1st day of November, 1915.

[SEAL.] (Signed) B. W. OPPENHEIM,
Notary Public for Idaho;
Residing at Boise, Ada County, Therein.

134 Bond approved, and to operate as a supersedeas.

(Signed) ISAAC N. SULLIVAN,
Chief Justice Supreme Court of Idaho.

Attest:

[SEAL.] I. W. HART, *Clerk.*

Endorsed: Filed Nov. 19, 1915. I. W. Hart, Clerk, By E. S. David, Deputy.

135 In the Supreme Court of the United States.

SECUNDINO OMAECHEVARRIA, Plaintiff in Error,

v.

STATE OF IDAHO, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law of the said State in which a decision could be had in the said suit between the State of Idaho vs. Secundino Omaechevarria, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said Secundino Omaechevarria, as by his complaint appears.

136 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty (60) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 19th day of November, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States District Court, Idaho, 1890.]

W. D. McREYNOLDS,
Clerk District Court United States,
District of Idaho.

Allowed, November 19, 1915.
ISAAC N. SULLIVAN,
Chief Justice Supreme Court of Idaho.

137 In the Supreme Court of the United States.

SECUNDINO OMAECHEVARRIA, Plaintiff in Error,
v.
STATE OF IDAHO, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the State of Idaho, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Idaho, wherein Secundino Omaechevarria is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Idaho, this 19th day of November, 1915.

[Seal of Supreme Court, State of Idaho.]

ISAAC N. SULLIVAN,
Chief Justice Supreme Court of Idaho.

Attest:
I. W. HART,
Clerk Supreme Court of Idaho.

137½ [Endorsed:] No. 2659. In the Supreme Court of the United States. Secundino Omaechevarria, Plaintiff in Error, vs. State of Idaho, Defendant in Error. Writ of Error. Filed Nov. 19" 1915, at — o'clock —. M. I. W. Hart, Clerk, By E. S. David, Deputy Clerk. Oppenheim & Hodgin, Lawyers, 602-3-4 Idaho Bldg., Boise, Idaho, Attorneys for Plaintiff in Error.

138 BOISE, IDAHO, November 19, 1915.

We, attorneys of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

J. H. PETERSON,
By M. HENSCHKEL,
Attorney General for the State of Idaho,
Residence, Boise, Idaho;
RUSSEL G. ADAMS,
Prosecuting Attorney, Owyhee County, Idaho,
Residence, Silver City, Idaho;
WM. HEALY,
Residence, Boise, Idaho;
Attorneys for the State of Idaho.

138½ [Endorsed:] No. 2659. In the Supreme Court of the United States. Secundino Omaechevarria, Plaintiff in Error, vs. State of Idaho, Defendant in Error. Citation. Filed Nov. 19" 1915, at — o'clock —. M. I. W. Hart, Clerk, By E. S. David, Deputy Clerk. Oppenheim & Hodgin, Lawyers, 602-3-4 Idaho Bldg., Boise, Idaho, Attorneys for Plaintiff in Error.

139 In the Supreme Court of the State of Idaho.

STATE OF IDAHO, Plaintiff,
vs.
SECUNDINO OMAECHEVARRIA, Defendant.

Præcipe for Transcript.

To the Clerk of the above entitled court:

The defendant, Secundino Omaechevarria, in the above entitled case hereby requests that you furnish him with a transcript of the following papers and files herein:

A copy of the Opinion of the court in the above entitled case.
A copy of the Opinion of the court in the case of State of Idaho v. Horn, et al.
Copy of Petition for rehearing.
All the minutes of the court with reference to the above entitled cause, including the minutes on application for rehearing.
The original Record on Appeal and the whole thereof, including the original Assignment of Errors.
The original Petition for Writ of Error, together with its allowance.
A copy of the Bond and its approval.
The original Writ of Error with the allowance thereon.
The original Citation with service thereon.
The certificate of the Chief Justice with relation to the opinion in the case of the State of Idaho v. Horn.

(Signed) OPPENHEIM & HODGIN,
Attorneys for Defendants,
Residing at Boise, Idaho.

Endorsed: Filed Dec. 18, 1915. I. W. Hart, Clerk.

140 SECUNDINO OMAECHEVIARRIA, Plaintiff in Error,
vs.
STATE OF IDAHO, Defendant in Error.

SUPREME COURT,
State of Idaho, ss:

Clerk's Certificate.

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the foregoing transcript, comprising pages 1 to 139 inclusive, contains true and correct copies of the following papers and records in the above entitled cause, to-wit: Transcript on Appeal from District Court to State Supreme Court; Record Entries; Opinion of Supreme Court in case of State v. Omaechevarria; Opinion of Supreme Court in case of State v. Horn, et al.; Application for Rehearing, Præcipe and Bond, together with original Certificate of the Court, Assignment of Errors; Petition for Writ of Error and Order granting same; Writ of Error and Citation.

In witness whereof, I have hereunto set my hand and affixed the seal of the court this 7th day of January, 1916.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk Supreme Court of Idaho.

141 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Idaho, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same, in accordance with præcipe filed in said cause on behalf of plaintiff in error.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Idaho, in the City of Boise, this January 7th, 1916.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk Supreme Court of Idaho.

142 & 143 Supreme Court of the United States.

SECUNDINO OMAECHEVARRIA, Plaintiff in Error,
vs.
STATE OF IDAHO, Defendant in Error.

Stipulation as to Printing Record.

It is stipulated and agreed by and between Oppenheim & Hodgin, counsel for plaintiff in error, and J. H. Peterson, William Healy, and Russell G. Adams, counsel for defendant in error, that the entire record in the above entitled cause, including the opinion of the court in the cases of State of Idaho vs. Horn, et al., and State of Idaho vs. Secundino Omaechevarria, shall be printed.

OPPENHEIM & HODGIN,
Residence, Boise, Idaho,
Att'ys for Plaintiff in Error.
J. H. PETERSON,
Att'y for Defendant in Error,
Residence, Boise, Idaho.
WILLIAM HEALY,
Residence, Boise, Idaho,
Att'y for Def't in Error.
RUSSELL G. ADAMS,
Residence, Silver City, Idaho,
Att'y for Def't in Error.

144 [Endorsed:] 849/25132. Supreme Court of the United States. Secundino Omaechevarria, Plaintiff in Error, vs. State of Idaho, Defendant in Error. Stipulation as to Printing Record. Filed ——, 191 , at — o'clock M. —— ——, Clerk. —— ——, Deputy Clerk. Oppenheim & Hodgin, Lawyers, 602-3-4 Idaho Bldg., Boise, Idaho, Attorneys for Plaintiff in error.

Endorsed on cover: File No. 25,132. Idaho Supreme Court. Term No. 379. Secundino Omaechevarria, plaintiff in error, vs. The State of Idaho. Filed February 14th, 1916. File No. 25,132.

No. [redacted]102 OCTOBER TERM, 1917

Supreme Court of the United States

SECUNDINO OMAECHEVARRIA, Plaintiff in Error,

vs.

STATE OF IDAHO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

BRIEF OF PLAINTIFF IN ERROR.

SHAD L. HODGIN,
FRANK P. PRICHARD,
For Plaintiff in Error.

OPPENHEIM & HODGIN,
BOISE, IDAHO,
PRICHARD, SAUL, BAYARD & EVANS,
PHILADELPHIA, PA.,
Of Counsel.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

SUBJECT INDEX.

LIST OF CASES REFERRED TO.

Supreme Court of the United States.

OCTOBER TERM, 1916.

Secundino Omacchevarria, Plaintiff in Error.

vs.

State of Idaho.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error was a sheep herder. In August, 1914, he was herding a flock of sheep upon public lands of the United States within the State of Idaho. He was arrested and prosecuted criminally on the ground that the portion of the public lands of the United States upon which he was herding his sheep was exclusively a cattle range (Record, page 2) under a statute of Idaho which made it a misdemeanor to herd sheep on land previously or usually occupied as a cattle range. He was convicted and sentenced

(Record, page 9) and appealed to the Supreme Court of Idaho which sustained the conviction in an opinion (Record, page 58). He then took the present writ of error on the ground that the statute under which he was convicted was in so far as it related to unenclosed public lands of the United States, in conflict with the Fourteenth Amendment of the Constitution of the United States and with an Act of Congress of February 25th, 1885. The sole question in the case is the validity of the Idaho Statute.

The testimony on the part of the State was to the effect that the place where the sheep were being herded was public land of the United States (Record, page 25), that it was part of an unenclosed tract of approximately fifteen or sixteen miles in one direction and eleven or twelve miles in another (Record, page 20), that it was partly, but not wholly within natural boundaries (Record, page 38), that its boundaries were not marked, but had prior to the suit been agreed upon by the cattle men as what they would claim to be an exclusive cattle range (Record, page 24), that the tract had been generally used as a cattle range, but that occasional bands of sheep had from time to time been herded on parts of it, but never at the spot where the accused was herding his sheep (Record, pages 33 and 38); that while sheep and cattle can graze together on the same range, the tendency is for the sheep to drive off the cattle because the sheep trample the grass and especially because the sheep are accompanied by herders with dogs and the cattle are unattended and the herders will not let the cattle alone (Record, pages 23,-26,-36) and that defendant had been notified by the cattle men that they claimed this particular range as an exclusive cattle range (Record, page 39).

The sole question involved is the validity of the statute and the foregoing resume of the testimony is given solely for the information of the Court as to the circumstances under which the statute was applied.

SPECIFICATION OF THE ERRORS RELIED ON.

I. That the Supreme Court of Idaho erred in holding and deciding that Section 6872 of Revised Codes of the State of Idaho was valid. The validity of said section was denied and drawn in question by the defendant on the ground of its being repugnant to the Constitution and laws of the United States, and in contravention thereof.

II. That the Supreme Court of the State of Idaho, in its decision and judgment erred in affirming the judgment of the Court below, for the reason that the statute of the State of Idaho, upon which the prosecution herein is based, being Section 6872 of the Revised Codes of the State of Idaho, is invalid and unconstitutional and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

III. That said Court erred in holding that Section 6872 of the Revised Codes of Idaho does not abridge the privileges and immunities of citizens of the United States, and especially those of said defendant.

IV. That the said Court erred in holding that Section 6872 of the Revised Codes of Idaho does not deprive the defendant of property without due process of law.

V. That the said Court erred in holding that said section does not deny to any person within the jurisdiction of the State of Idaho the equal protection of the law, and especially to the defendant.

VI. That said Court erred in holding that said section is not in conflict with the Act of Congress of February 25th, 1885 (23 U. S Statutes at Large, page 321).

ARGUMENT.

This case involves no complication of facts and but a single question viz: whether a certain statute of the State of Idaho as applied to the herding of sheep and cattle on public lands belonging to the United States is in conflict with the Fourteenth Amendment of the Constitution of the United States and with a statute of the United States relating to the use of public lands.

The Statute of Idaho in question is as follows:—

> "SECT. 6872. Any person owning or having charge "of sheep who herds, grazes or pastures the same or "permits or suffers the same to be herded, grazed or "pastured on any cattle range previously occupied "by any cattle or upon any range usually occupied by "any cattle grower either as a spring, summer or winter "range for his cattle, is guilty of a misdemeanor, but "the priority of possessory right between cattle and "sheep owners to any range is determined by the "priority in the usual and customary use of such range "either as a cattle or sheep range."

It is claimed that this statute is invalid as applied to public lands of the United States.

First.—Because it violates the following provisions of the Fourteenth Amendment to the Constitution of the United States, viz:—

> "No state shall make or enforce any law which shall "abridge the privileges or immunities of citizens of "the United States nor shall any State deprive any per- "son of life, liberty or property without due process "of law nor deny to any person within its jurisdiction "the equal protection of the laws."

Second.—Because it is in conflict with Section 1 of the Act of Congress of February 25th, 1885 (23 U. S. Statutes at Large 321 U. S. Compiled Statutes, Section 4997) which reads as follows:—

"(Inclosure of or assertion of right to public lands "without title.) All inclosures of any public lands "in any State or Territory of the United States "heretofore or to be hereafter made, erected or "constructed by any person, party, association or cor- "poration, to any of which land included within the "inclosure the person, party, association or corpora- "tion making or controlling the inclosure had no claim "or color of title made or acquired in good faith, or "an asserted right thereto by or under claim made "in good faith with a view to entry thereof at the "proper land office under the general laws of the United "States at the time any such inclosure was or shall "be made, are hereby declared to be unlawful and the "maintenance, erection, construction or control of any "such inclosure is hereby forbidden and prohibited and "the assertion of a right to the exclusive use and oc- "cupancy of any part of the public lands of the United "States in any State or any of the Territories of the "United States without claim, color or title or asserted "right as above specified as to inclosure is likewise "declared unlawful and hereby prohibited."

These two questions will be discussed separately.

AS TO THE VIOLATION OF THE FOURTEENTH AMENDMENT.

It will be observed that the Statute of Idaho deals with the regulation of the respective rights of cattle and sheep owners as against each other and was enforced in the present case as to such rights on public lands belonging to the United States.

It is also apparent that it applies and was intended to apply to the herding or grazing of cattle and sheep as lawful not unlawful occupations and on land adapted and suitable for use by either sheep or cattle. It recognizes the fact that a range may be used either for cattle or sheep, and the Supreme Court of Idaho in discussing this statute in the case of Idaho *vs.* Butterfield, 165 Pacific Reporter

218 hereinafter more fully discussed, has recognized the fact that such land may also be used as a joint cattle and sheep range.

The Statute of Idaho therefore does not deal with or regulate the grazing of sheep or cattle as unlawful occupations or nuisances injurious to the public, but as lawful occupations proper to be carried on upon the public domain. Its sole purpose is to define and prescribe the rights of cattle owners with regard to sheep owners in the use of such domain, and punish infringement of the rights so defined.

It is important at the outset therefore to determine what are the respective rights of cattle herders and sheep herders in the public domain.

Fortunately not only has Congress dealt with the subject in the Act of Congress already cited, which prohibits any assertion of an exclusive right by either, but this Court in the case of Buford *vs.* Houtz, 133 U. S. 320 has declared that the public domain

> "is public land belonging to the United States in "which the right of all parties to use it for grazing "purposes if any such right exists is equal,"

and has then added

> "We are of opinion that there is an implied license "growing out of the custom of nearly a hundred years "that the public lands of the United States, especially "those in which the native grasses are adapted to the "growth and fattening of domestic animals, shall be "free to the people who seek to use them where they "are left open and unenclosed and no act of the gov- "ernment forbids this use."

It has been settled by this Court in the case of Bacon *vs.* Walker, 204 U. S. 311, that the fact that sheep herding on the public domain was lawful did not destroy the right of the State of Idaho to make reasonable regulations with regard to it to protect the encroachment of the sheep on or

within a certain distance of the dwellings of owners of claims and that the fact that such regulations applied to sheep alone and not to cattle also did not make such regulation an unlawful discrimination. It may be of some assistance in the present controversy to briefly allude to the character and extent of that decision.

The Legislature of Idaho had passed a statute prohibiting the herding of sheep within two miles of the dwelling house of the owner of possessory claims. The question of the validity of this statute was decided three times in the State Court, once in the case of Sifers *vs.* Johnson, 7 Idaho 798 (65 Pac. Rep. 709) and twice (once on argument and again on re-argument) in the case of Sweet *vs.* Ballentyne, 8 Idaho 431 (69 Pac. Rep. 995).

In each case there was a dissent, the question being decided by two judges against one.

The ground on which the decision of the Court was finally based was that the presence and feeding of large flocks of sheep near a dwelling was, owing to the character and habits of the sheep, a nuisance, and while the Court thought that the two mile limit was excessive, it could not interfere with the judgment of the Legislature as to the proper limit of distance.

In this Court the decision was attacked on the ground that the statute took away the rights of the sheep owners in the public domain and was unjustly discriminating because it applied to sheep alone. These grounds were overruled and the statute was sustained as a reasonable regulation of the business by the State.

It will be observed that the Statute of Idaho involved in that case did not deal with the equal rights of lawful users of the public domain with respect to each other, but regulated the business of one class of those users so that they should not interfere with or become a nuisance to the owners of ground and it did this by fixing a definite limit within which such users should not approach a dwelling house.

In the present case the Statute of Idaho under consideration deals not with any regulation of the business of sheep herding with regard to land owners or to the public, but

solely with regard to the respective use of the public domain by two classes of licensed users who have equal rights viz: sheep owners and cattle owners, and the question now before the Court is whether this statute is in any just sense a reasonable regulation of a business or is the wrongful abridgment by the State of the privilege of sheep owners to use the public lands, a wrongful deprivation of their rights therein and a refusal to them of the equal protection of the laws.

To determine this, recourse must be had to the necessary effect of the provisions of the statute.

First.—As to all ranges which prior to the passage of the statute had been "usually occupied by any cattle grower "either as a spring, summer or winter range for his cattle" the immediate effect of the statute was to give to such cattle growers possessory right at will of such lands to the exclusion of all sheep owners and this irrespective of whether at the time the sheep owner wished to herd his sheep on the land there were any cattle on it. In other words, until the cattle owners abandoned the land by ceasing to put any cattle on it either in the spring, summer or winter it was theirs for pasture of their cattle to the exclusion of all sheep owners in all seasons of the year. In fact the statute speaks of this right as a "possessory right."

Second.—As to land which up to the time of the passage of the statute had been used as a sheep range, the cattle owners could acquire a possessory right by pasturing their cattle on it when there were no sheep on it and continuing to use it since there is no prohibition in the statute of the pasturing of cattle on land previously occupied by sheep, nor is there any penalty attached to such act, while there is on the contrary a prohibition of the herding of sheep on land previously occupied by cattle.

Third.—As to land which at the time of the passage of the statute had not been customarily used for either cattle

or sheep, the cattle owners could acquire a possessory right at will to the exclusion of the sheep owners by simply putting cattle on some portion of the range in either spring, summer or winter and continuing this practice for a sufficient length of time (not defined by the statute) to make it a usual practice whereupon the sheep owner could not pasture his sheep on any part of the range at any season.

Fourth.—No means being provided by the statute for the ascertainment of the boundaries of a range or of the length of time necessary to make a "usual" practice or for the ascertainment of the fact of "usual occupation" as a spring, summer or winter range, the sheep herder if he herds his sheep on any portion of the public domain is liable to be treated as a criminal owing to the existence of facts of which he has no practical means of prior certain knowledge. A range is a large tract of land of undefined and unmarked boundaries commonly many square miles in area (Record, page 61). Occupation of it by a herd of cattle does not mean that they are scattered all over it at once, but only that they range within it in search of subsistence.

If a sheep herder having selected a spot in the public domain where his sheep can graze wishes to avoid being a criminal under the statute, is there any way by which he can eliminate the risk? There may be no cattle in sight and yet there may be somewhere out of sight a herd of cattle whose range will extend to the spot selected. The only way by which he can ascertain that the spot is part of a range is to inquire of such persons as he can find in the neighborhood and the only way by which he can ascertain the boundaries of the range is to call all the parties in the neighborhood together to agree upon it, and even then the owners of any cattle who are then or who may have been grazing on the tract may be absent and be not bound by this agreement as to boundaries. Finally having as best he might ascertained whether the land is in a range and what its boundaries are, and having sent men

over the many square miles of territory to be sure that it is not occupied by a herd of cattle he is then confronted with the problem whether it has been theretofore usually occupied as a spring, summer or winter range, and to do this he must not only inquire over the whole neighborhood and take the risk of the accuracy of the answers, but he must solve the problem of how many seasons make the occupation "usual" and for how many seasons the use must be discontinued to terminate the "usual" occupancy. It will readily be seen that these conditions are such as to practically put an end to the use of most of the public land by sheep herders since they attach to such use a risk of criminal prosecution which cannot be avoided. It is no answer to this suggestion that the Court charged the jury that before they could convict the sheep herder they must find that he knew or should have known that he was herding on an exclusive cattle range. The statute provided no practical means by which he could accurately verify any information given to him or determine what was meant by a usual occupation as a cattle range of this large tract of land to the exclusion of sheep. Do what he would he had either to accept and obey any warning or information he received from cattle men or else run the risk of being held to be a criminal because of the decision of a Court and jury as to these uncertain factors. No such risk was imposed on the cattle owners and the result inevitably would be to abridge if not wholly prevent the use of the public domain by the sheep owner for the benefit of the cattle owner.

Fifth.—Although the statute has an appearance of equality in the statement that the "priority of possessory "right between cattle and sheep owners to any range is de- "termined by the priority in the usual and customary use of "such range," its prohibitory provisions are wholly adapted to accomplish inequality. The prohibitory and penal provisions of the statute apply to sheep owners alone, not to cattle owners. The owner of cattle runs no risk of criminality in pasturing his cattle whether on unoccupied

land or land occupied by sheep. He is not prohibited from pasturing on land previously occupied by sheep or on land usually occupied as pasture for sheep. The statute destroys the equality of rights in the public domain previously possessed by cattle owners and sheep owners and abridges the rights of one in order to add to the rights of another.

Sixth.—Moreover not only are the rights of the sheep owner to enter upon and use in common with others the public domain abridged but he has no remedy. He cannot apply to any court to fix the boundaries of a range or to ascertain its usual occupancy. By no possible means can he certainly avoid the risk of conviction as a criminal if he pastures his sheep upon any portion of the public domain.

In view of the language of the statute and the results which it works, it is submitted that it cannot be sustained as the reasonable regulation by a state of the business of herding sheep. It is rather an attempt by the state to regulate unequally the respective rights of cattle owners and sheep owners which this Court has declared to be equal.

Statutes which under the exercise of the police power are reasonable regulations of business have always been sustained by this Court, but on the other hand, such statutes have been held unconstitutional wherever under the guise of regulation they have taken away rights from one class for the benefit of another, or taken away rights from one class while allowing them to others who with regard to the subject matter are entitled to the same rights, as for example in the Chinese Laundry case (Yick Wo *vs.* Hopkins, 118 U. S. 356), in the case of prohibition of sales of articles sold by a trust (Connolly *vs.* Union Sewer Pipe Co., 184 U. S. 540), in the Arizona case of the requirement that eighty per cent. of employees should be native born citizens (Truax *vs.* Raich, 239 U. S. 33) in the upper berth case (Chicago M. & St. P. R. R. *vs.* State of Wisconsin, 238 U. S. 491) and in the building restriction case (Dobbins *vs.* Los Angeles, 195 U. S. 223).

That the statute is designed to destroy the equality in the right of use of the public domain, which without it the cattle owners and sheep owners would enjoy is apparent on the face of the statute and is practically admitted by the Supreme Court of Idaho. Prior to the statute neither class had possessory rights in the public domain, but only an equal license to use. The statute provides for the acquisition by the cattle owners of certain rights which it is made criminal for the sheep owners to infringe and it calls these rights possessory rights, while by these provisions and by omitting all prohibitions and penalties against the cattle owners it effectually prevents the acquisition of similar rights by sheep owners and practically destroys the license rights which they did possess. The Supreme Court of Idaho in its decision (Record, page 70) admits that this is a subordination of the rights of sheep owners to those of cattle owners, and claims that it is within the police power of the Legislature as a police regulation "to subordinate the "sheep industry to the cattle industry."

It is submitted that the vice of the decision of the Court below is found in the sentence last quoted and that if as has been held by this Court there is an equal right of all parties to use for grazing purposes the unenclosed lands belonging to the United States and adapted to such purposes it is not within the power of the State under the guise of a police regulation to subordinate the rights of one class of persons to those of another. It may be the policy of the State to encourage the cattle industry and for that purpose to subordinate to it the sheep industry, but it has no right in the furtherance of that purpose to interfere with the equality in the use of lands of the United States by those whom Congress expressly or impliedly allow to use it. It is submitted that Congress alone can encourage one industry on United States lands by abridging the rights of those engaged in another industry. It may be also that the sheep herding would have a tendency to hinder or drive out the cattle. This is not admitted, but if it is so it is for Congress to apply the remedy. So long as Congress allows all people to freely use the public domain it is submitted that the State

cannot abridge the rights of some in order to encourage or protect the rights of others.

AS TO THE ACT OF CONGRESS OF FEBRUARY 25, 1885.

It is submitted that the power of determining the relative rights of different classes of persons in the public domain of the United States belongs to Congress and that even if the States could interfere with such rights for the purpose of subordinating one industry to another in the absence of Congressional action (which is not admitted) they could not regulate such respective rights after Congress had taken action on the subject.

The Act of February 25th, 1885 (*supra*, page 5) clearly confirms the equality of all persons in the right of use of the public lands and prohibits either the enclosure of or the assertion of an exclusive right to any portion thereof. Yet the Idaho statute practically gives under certain conditions the exclusive use of such lands to cattle owners as against sheep owners. If the cattle owners can establish that the land is in possession of or has been customarily used by cattle as a range, the cattle owners have the exclusive right to it as against the sheep owners. This it is submitted is a direct violation of the United States statute on a subject as to which the United States has exclusive control.

The foregoing summary of the argument is given for the convenience of the Court before any elaborate review of the authorities. These authorities will now be considered and cited in connection with the points to which they relate.

Prof. Black, in Black's Constitutional Law (2nd ed.) page 366, states under the head of "Limitations of the Police Power":—

> "It is necessary to the validity of police regulations "that they should not: First, violate any provision of "the federal or State constitutions; second, interfere "with the exclusive jurisdiction of Congress; third, un- "lawfully discriminate against individuals or classes;

"fourth, be unreasonable; fifth, invade private rights, "liberty or property unnecessarily; sixth, they must "actually relate to some one or more of the objects for "the preservation of which this power may be exer- "cised and be proper and adapted to that purpose."

The same author, at page 377, under the head of "Un- "reasonable Laws and Unjust Discriminations," uses the following language:—

"Police regulations must not be unreasonable nor "must they make unjust discriminations against indi- "viduals or classes. For example, an ordinance of the "City of San Francisco set apart a certain district or "portion of the city for the Chinese quarter, required "all Chinamen to remove into such quarter and re- "quired them thereafter to confine their residence and "business to such quarter, under heavy penalties. It "was held that this was void. It was not a valid exercise "of the police power of the State or city because it "operated as an unjust and oppressive discrimination "against Chinese. * * * Again, an ordinance "which professed to regulate the establishment of laun- "dries in wooden buildings, but which, in effect, gave "to a board of supervisors an arbitrary and uncontroll- "able power to allow or prohibit the use of such build- "ings for that purpose at their mere pleasure and which "concerned both persons and places and which was, in "fact, so enforced as to discriminate unjustly against "the Chinese, was held void."

(Citing Yick Woo *vs.* Hopkins, 118 U. S. 356 6 Supreme Court, 1064.)

It will be noted that, in the case just cited, it was left to the arbitrary power of the supervisors to determine whether or not such buildings might be used and what persons might use them for the purpose of conducting laundries.

We make the same point against this statute because it leaves it to the arbitrary action of those claiming the right

to the exclusive use of the range to fix the boundaries thereof and to determine, in the first instance, whether or not the range is a cattle range within the meaning of the statute. See testimony of witness Geo. Swisher (Printed Record, page 24, f. 39) and witness E. A. Stauffer (Printed Record, page 34, ff. 55 and 56).

Continuing, the author says:—

> "Take one more illustration. A city ordinance re-
> "quired a railroad company to keep a flagman stationed
> "at a particular street crossing, but the court con-
> "sidered, under all the circumstances of the case, that
> "the danger to the public at this particular crossing was
> "not sufficient to authorize the municipality to put the
> "railroad to that trouble and expense, which could be
> "sufficiently avoided by other and simpler means. It
> "was, therefore, held that the ordinance was unreason-
> "able and for that reason void."

The same author, at page 373, speaking of the province of the Court, said:—

> "The courts are not bound by mere forms nor are
> "they to be misled by mere pretenses. They are at lib-
> "erty, indeed are under a solemn duty, to look at the
> "substance of things whenever they enter upon the in-
> "quiry, whether the Legislature has transcended the
> "limits of its authority. If, therefore, a statute, pur-
> "porting to have been enacted to protect the health,
> "public morals or the public safety, has no real or sub-
> "stantial relation to the subject or is a palpable invasion
> "of rights secured by the fundamental law, it is the
> "duty of the courts to so adjudge and thereby give
> "effect to the constitution."

In 6 Ruling Case Law, page 194, the author, speaking upon the constitutional limitations on police power, after stating that the fourteenth amendment to the constitution of

the United States does not interfere with the proper exercise of the police power in the several states, uses this language:—

> "Where, however, laws or regulations enacted or im-
> "posed under police power are palpably arbitrary, un-
> "just or unreasonable, or where equal protection of the
> "laws is denied, they fall within the inhibition of this
> "amendment, as do laws or regulations generally which
> "unreasonably invade private and constitutional
> "rights."
>
> "In this connection, it has been said that, to justify
> "the interposition of the authority of the State in en-
> "acting police regulations, it must appear that the in-
> "terests of the public generally, as distinguished from
> "those of a particular class, require such interference.
> "For it is a rule that police power cannot be invoked
> "to protect one class of citizens against another class
> "unless such interference is for the real protection of
> "society in general."
>
> * * * * * * *

The same author, at page 211, speaking of the regulation and prohibition of occupations, after discussing the subject generally, says:—

> "Moreover, this right of regulation is dependent
> "upon a reasonable necessity for its exercise to protect
> "the health, morals or general welfare of the state, and
> "hence, if a lawful business is of a beneficial character
> "and not dangerous to the public, either directly or in-
> "directly, it cannot be subjected to any police regulation
> "whatever. It is not necessary that it always affect
> "injuriously the public at large. On the contrary, it
> "may be regulated if it affects injuriously those en-
> "gaged in it or those brought in direct contact with it,
> "even though its practice may benefit generally the
> "people of the state at large."

The same author, at page 429, speaking of discriminatory administration of the laws, says:—

> "Although, as a general rule, a law cannot be held "unconstitutional because, while its just interpretation "is consistent with the constitution, it is unfaithfully "administered by those who are charged with its exe- "cution, it is, nevertheless, an equally well established "principle that a provision not objectionable on its face "may be adjudged unconstitutional because of its effect "in operation. Hence it is that, in considering the "classification embodied in the statute, regard should "be given not only to its final purpose but likewise to "the means provided for its administration."

The statute under consideration here is subject to the very objections pointed out by the author just quoted. The means provided for its administration are, and must be arbitrary. In its operation, it is not only uncertain but is unjust and does not operate alike on all persons under like circumstances, and if held valid it will work injury to a great industry, if it does not wholly destroy it.

The same author, at page 472, speaking of due process of law, uses the following language:—

> "Wherever the operation of any general regulation "is to extinguish or destroy that which, by the law of "the land is the property of any person, so far as it has "that effect, it is unconstitutional and void and hence "it is, while burdens and expense may, within reason- "able and constitutional limits, be imposed on property, "constitutional limitations as to due process of law "may, however, be violated by enactments in the exer- "cise of the police power which imposes unreasonable "restraints and burdens on property and the enjoyment "of property rights or which work practical confisca- "tion of property or its beneficial use."

In State *vs.* Goodwill (33 West Virginia, 179), reported in Vol. 25, Am. St. Reps., page 863, the Court had under

consideration an act to secure to operatives and laborers engaged in and about mines the payment of their wages at regular intervals and in lawful money. In holding the act unconstitutional, the Court, at page 866, used this language:—

> "The rights of every individual must stand or fall "by the same rule of law that governs every other "member of the body politic under similar circum- "stances and every partial or private law which di- "rectly proposes to destroy or affect individual rights "or does the same thing by restricting the privileges of "certain classes of citizens and not of others, when "there is no public necessity for such discrimination, "is unconstitutional and void.
>
> "Were it otherwise, individuals or corporation bodies "would be governed by one law and the mass or com- "munity and those who make the law by another, "whereas a like general law affecting the whole com- "munity equally could never have been enacted."
>
> (Citing Wally's Heirs *vs.* Kennedy, 24 Am. Dec., 511.) 2 Yerger 554.

The statute under consideration here is subject to the objection herein pointed out, in this, that it gives to the cattle owner the exclusive right, as against sheep owners, to graze his cattle upon the public domain, and brings to his aid the strong arm of the criminal law and the whole power of the State to enforce that exclusive privilege. Not only this, but it leaves it for the cattle grower to say where the boundary lines of his range shall be located. In other words, the cattle grower is permitted, under this statute, in the first instance, to determine the character of the range and to fix the boundary lines. On the other hand, if a sheep grower can acquire range under this statute, a proposition which we very much doubt, there is no means whereby he may keep the cattle off such range.

At page 868, the same Court, speaking of the limit of the police power, said:—

"But this power, however broad and extensive, is not "above the constitution, which is the supreme law and, "insofar as it imposes restraints, the police power must "be exercised in subordination to it."

In a note to the same case, at page 880, the following language is used:—

"A tax is also arbitrary if it is one which is not "definite or prescribed by law, in the application of "which the officer to whom its enforcement is com- "mitted can find no guide in the law and may there- "fore lawfully permit the applicant to carry on business "for such reason as to the officer may seem proper, or "may lawfully grant a permit to one person while he "denies it to another equally well qualified to carry on "the business."

We have the same situation here. It is left to the cattle grower to determine whether a given section of the country is a cattle range and where the boundary lines are established. He may permit one sheep grower to cross the imaginary line and graze his sheep upon what he, the cattle grower, considers a cattle range and may deny this privilege to another sheep grower, under the penalty of prosecution. The prosecuting attorney could do likewise. The Legislature may pass a law regulating the running at large of sheep in the State, but it has no power to leave the determination of a fact, the pre-existence of which is necessary to be determined before there can be a violation of the statute, to the arbitrary action of an individual, or the public prosecutor.

In Miller *vs.* Horton, 152 Mass. 540, reported in 23 Am. St. Reps., page 850, the Court, in the syllabus, used the following language:—

"While the legislature may declare horses affected "with glanders to be nuisances and authorize them to "be killed without compensation to their owners, it

"cannot make the decision of an *ex parte* body conclu-
"sive that a horse is diseased and deprive its owner of
"the right to be heard and to have a trial by jury upon
"the question whether or not it was infected with the
"disease specified in the statute."

In the First National Bank of Mt. Vernon *vs.* Sarlls, reported in 28 Am. St. Reps., at page 185, 129 Indiana 201, the Court had under consideration a city ordinance regulating the erection and purpose of buildings within the fire limits. The ordinance was held unconstitutional for the reason that it arbitrarily fixed the value of repairs to be made at the sum of $300.00.

In Pearson *vs.* Zehr, 138 Ill. 48, 32 Am. St. Reps., page 113, the Supreme Court of Illinois had under consideration the constitutionality of an act giving the livestock sanitary board power to kill or destroy domestic animals in cases of contagious or infectious diseases. On page 116, the Court said:—

"It is to be borne in mind that the Act of 1885
"makes no provision for the compensation for animals
"killed by mistake and which are not diseased with a
"contagious or infectious disease and for paying the
"value of animals slaughtered upon an erroneous sup-
"position that they have been exposed to such disease,
"and also makes no provision for a suit or proceed-
"ing wherein, after proper notice to the owner of the
"domestic animals purported to be striken with a con-
"tagious or infectious malady be given and an op-
"portunity afforded him to be heard and to introduce
"his witnesses, there can be a judicial ascertainment
"of the fact of the existence or non-existence of such
"disease or of exposure thereto, and that there is no
"pretense here of any such ascertainment of the fact
"or facts. To permit the commissioners to determine,
"*ex parte*, that some of the horses had the glanders
"and that the others had been exposed thereto, and
"to hold that determination a justification for slaught-

"ering the horses, without imposing upon appellants "the burden of establishing affirmatively the actual "existence of such disease and such exposure, would "be a palpable violation of the constitutional provi- "sion that no person shall be deprived of property with- "out due process of law."

(Citing Miller *vs.* Horton, 152 Mass. 540, 23 Am. St. Reps. 50.)

We have the same situation under this statute. The existence or non-existence of the fact whether or not a given territory is a cattle range and where the boundary lines are located is left to the arbitrary and *ex parte* determination of those claiming adversely to the defendant.

In Gillespie *vs.* People, 188 Ill. 176, reported in 80 Am. St. Rep. 176, the Court had under consideration a statute which made it a criminal offense for an employer to discharge an employee belonging to a labor organization. After discussing the fundamental questions of life, liberty and property at some length, the Court said:—

"The right to terminate such a contract is guaran- "teed by the organic law of the state. The legislature "is forbidden to deprive the employer or employee of "the exercise of that right. The legislature has no "authority to pronounce the performance of an inno- "cent act criminal when the public health, safety, com- "fort, or welfare is not interfered with."

And here we contend the statute under consideration is subject to the identical objection raised in the case quoted. The act made criminal by this statute is *per se* an innocent act, that is to say, there is no offense, neither does it affect the general welfare, when shep are herded or grazed upon the public domain.

Continuing, the Court said:—

"The statute in question says that if a man ex- "ercises his constitutional right to terminate a contract

"with his employee, he shall, without a hearing, be "punished as for the commission of a crime."

"In passing upon the validity of a statute similar "to the Act of 1893, the Supreme Court of Missouri "in the case of State *vs.* Julow, 129 Mo. 163, 50 Am. "St. Rep. 443, has well said: 'The law under review " 'declares that to be a crime which consists alone in " 'the exercise of a constitutional right, to wit, that " 'of terminating a contract, one of the essential at- " 'tributes of property, indeed property itself, under " 'preceding definitions. * * * But the act as " 'charged, as already seen, is not a crime, and will " 'not be a crime, so long as constitutional guaranties " 'and constitutional prohibitions are respected and en- " 'forced.' "

The same is true with reference to the statute under consideration here. Let us take away Section 6872 and see what the rights of the parties are. Under the decision of the Supreme Court of the United States in Buford *vs.* Houtz, 133 U. S. 320, the Court reviews the history of the right of the citizen to pasture his stock upon the unappropriated public domain and therein holds that the right is an implied license. That right has also been recognized by Congress in the enactment of a statute (Act of Congress of February 25th, 1885, 23 Statutes at Large, 321), which prohibits the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in a state or any of the territories of the United States, without claim, color of title or asserted right as above specified, is declared unlawful and prohibited. Thus the right of the citizens to use the public domain in common is recognized. Hence, without the interposition of Section 6872, it is not a crime to graze sheep upon the public domain. Therefore, the Legislature has not the power to declare an act innocent within itself, a crime. The right to graze sheep upon the public domain is as much guaranteed by the constitution as the right to acquire and possess property and to pursue

happiness. If the Legislature can restrict the grazing of sheep upon the public domain at all, it is only by reason of the fact that it will promote the general welfare and it is without power to declare an act innocent within itself, a crime.

Quoting further:—

> "If an owner, etc., obeys the law on which this "prosecution rests, he is thereby deprived of a right and "a liberty to contract or terminate a contract as all "others may; if he disobeys it, then he is punished for "the performance of an act wholly innocent, unless, in- "deed, the doing of such act guaranteed by the organic "law, the exercise of a right of which the Legislature "is forbidden to deprive him, can, by that body, be con- "clusively pronounced criminal. We deny the power "of the Legislature to do this; to brand as an offense "that which the constitution designates and declares to "be a right, and therefore, an innocent act, and conse- "quently we hold that the statute which professes to "exert such a power is nothing more or less than a " 'legislative judgment,' and an attempt to deprive all "who are included within its terms of a constitutional "right without due process of law."

In State *vs.* Dalton, 22 R. I. 77, reported in 84 American State Reports 818, the Court had under consideration the validity of a statute which made it a criminal offense to give trading stamps to the purchasers of goods. Quoting from Lawton *vs.* Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 499, Mr. Justice Brown in delivering the opinion of the Court, said:—

> "To justify the State in thus interposing its au- "thority in behalf of the public, it must appear; 1. "That the interests of the public generally, as dis- "tinguished from those of a particular class, require "such interference; and 2. That the means are rea- "sonably necessary for the accomplishment of the pur- "pose, and not unduly oppressive upon individuals.

"The Legislature may not, under the guise of protect-
"ing the public interests, arbitrarily interfere with
"private business, or impose unusual or unnecessary
"restrictions upon lawful occupations. In other words,
"its determination as to what is a proper exercise of
"its police powers is not final or conclusive, but is sub-
"ject to the supervison of the courts." * * *

"We come, then, to the question whether the act
"before us is one which falls within the police power
"of the Legislature; for, if it is not, it is clearly an
"unlawful interference with private right. We will
"endeavor to test this question by the simple process
"of elimination.

"First, then, does said act look to or in any manner
"concern the public health. No one claims that it does,
"and no one could for a moment claim, with any basis
"of reason, that it has or was intended to have even the
"remotest bearing thereon.

"Second, does the act look to or tend to promote the
"public safety? Nothing of this sort either is claimed
"in its favor, and we fail to see that anything could be,
"for it bears no relation whatsoever thereto.

"Having thus eliminated two of the general grounds
"upon which said act must be supported as being a
"valid exercise of the police power, we come to the
"third and last one, which raises the question whether
'the act relates to or tends to promote the public morals.
"* * *

"In this connection it is pertinent to observe that it
"is not enough to warrant the State in absolutely pro-
"hibiting a given business that it is conducted by meth-
"ods which do not meet with general approval. There
"must be something in the methods employed which
"renders it injurious to the public in some one of the
"ways before mentioned, in order to warrant the State
"in interfering therewith. Nor is it enough to bring
"a given business within the prohibitory power of the
"State that it is so conducted as to seriously interfere

"with or even destroy the business of others. Take, "for illustration, the great department stores in our "large cities. By reason of the almost infinite variety "of goods which they carry they furnish greater facili- "ties to customers, and can offer them greater induce- "ments in the way of trade than can those stores which "carry but a single line of goods. The result is, as "everybody knows, that very many small traders have "been crushed out and obliged to abandon their business "entirely, while the owners of mammoth establishments "which supply almost everything which we eat, drink, "wear, use, need, or desire, whether useful or orna- "mental, are prosperous and successful in a remarkable "degree. But while the result of this method of doing "business is injurious to those who employ the more "primitive one, can it be said that a law prohibiting a "department store would be a valid exercise of the "police power? Clearly not. A case decided no "longer than December last holds that such a law is "invalid. * * *

"But whatever demoralization results therefrom is "incidental to that principle of evolution which is every- "where manifest in the mercantile and industrial, as "well as in the physical, world. The great law of com- "petition invites and promotes this sort of demoraliza- "tion, and the remedy for one who is injured by it lies "not in legislation, but in being able to keep pace with "the changed, if not always improved, methods."

The statute was held invalid.

In Stearns *vs.* City of Barre, 73 Vermont 281, reported in 87 Am. St. Reps. 721, the Court had under consideration a statute authorizing the city council to provide a supply of water for protection against fire, etc., and to condemn the lands, water rights and property of any person, company or corporation, and leaving it to the judgment of the council to determine the necessity of the taking, the Court said:—

"The clause which provides for proceedings like "those had in highway cases applies only to the taking.

"The clause granting an appeal restricts it to the deci-
"sion awarding damages. The intention to do this is
"indicated by the further provision that the work shall
"proceed as though no appeal had been taken. So it
"becomes necessary to pass upon the petitioners' claim
"that the provision leaving the question of necessity to
"the determination of the officials of the municipality
"taking the property without allowing an appeal ren-
"ders the act unconstitutional. * * * The consti-
"tution gives him something more than the right to
"recover his property from a summary seizure under
"an indefinite grant. His property is not to be taken
"unless necessary for the public use. The existence of
"that necessity is the foundation of the right to take,
"and its ascertainment should precede or accompany,
"and not follow, the taking. We are not satisfied with
"a rule which permits the taking of land without proof
"of the right to do so, and casts upon the owner the
"burden of instituting proceedings to save his property.
"This imposes upon the owners the necessity of furnish-
"ing bail for repeated suits in trespass or bonds for
"the payment of injunction damages, and these are
"burdens and risks which in some cases might easily
"deter a prudent man from any attempt to assert his
"claim. Remedies of this nature do not meet the
"spirit of the requirement. The *constitution guaran-*
"tees the protection of a right rather than the redress of
"a wrong.

"We hold the provision invalid, for that it leaves
"the extent of the taking to the final determination of
"the officers of the municipality making the condemna-
"tion."

The same principle applies to the case at bar. The statute under consideration imposes upon the defendant the necessity of furnishing bail to regain his libery before it can be judicially determined whether or not a cattle range "as con-
"templated by the statute" exists. The question whether or not the defendant trespassed upon a cattle range is a ques-

tion of fact for the jury, but the question of whether or not a cattle range actually existed is a question of fact which must be determined before the statute can operate, hence the statute must be supplemented by the arbitrary and *ex parte* action of someone. In other words, the right to declare a given area an exclusive cattle range must be reposed in someone, but this the statute does not do.

In the case of the City of Laurens *vs.* Anderson (75 S. C. 62), reported in 117 Am. St. Reps. in the note on page 892, this language was used:—

> "The right of every individual must stand or fall by "the same rule of law that governs every other member "of the body politic, under similar circumstances, and "every private or partial law which directly proposes to "destroy or affect individual rights, or does the same "thing by restricting the privileges of certain classes of "citizens, and not all others, when there is no public "necessity for such discrimination is unconstitutional "and void."

It is wholly unnecessary that it be made a crime to herd sheep on a cattle range. If we concede that it is necessary to protect the cattle industry that sheep owners be restrained from grazing sheep upon a cattle range (a proposition which we do not concede) still it is wholly unnecessary to make it a criminal offense, and under the authorities cited we deny the power of the Legislature to do so. In the case of what is commonly known as the two-mile limit law, it is not made a crime. Here the interests of the public demand much more protection than in the present case, for the reason that that statute was designed to protect the settler, the homesteader, the home builder, and yet the Legislature did not deem it necessary to make the violation of that statute a crime. And again under the two-mile limit law the boundaries are fixed within two miles of an inhabitant dwelling, everyone is charged with the knowledge of distance and may know certainly when he is within two miles of an inhabited dwelling and therefore protect himself against damages for

the violation of that act, but, under the statute we are considering, it is impossible for a sheep grower to know even approximately when he is about to violate the statute or has violated the same, and its violation is made a crime.

In State *vs.* Conlin, 65 Connecticut 478, decided in 1895, reported in 48 Am. St. Reps. 227, the Court had under consideration a penal statute which provided as follows:—

> "The mayor of any city, the warden of any borough, "the selectmen of any town, may issue a license to such "persons as they find proper persons to engage in a "temporary or transient business, in one locality, either "in a building, tent, or other premises, for the sale of "goods, wares and merchandise, * * * in their "respective cities, boroughs, or towns, for a term not "exceeding one year, upon the applicant paying to such "municipal corporation a fee of not less than one "dollar, nor more than one hundred dollars, as the au- "thority issuing such license may direct * * *" (Making a violation of this statute a misdemeanor).

Passing upon the validity of this statute, the Court said:—

> "The Legislature has power to require a license for "the transaction of any business, either for the purpose "of raising a revenue, or for the purpose of regulating "the conduct of such business, as the public interests "may demand. This power, however, is, in the man- "ner of its exercise, subject to the limitations em- "bodied in the constitution, including in that term the "Constitution of the United States, as well as that "of Connecticut; the former, so far as it relates to such "question, is in reality a part of the latter, and must "be so regarded by this Court in determining the "validity of any legislative act. The question whether "or not a particular law is obnoxious to any such limi- "tation does not depend upon the wisdom of the law. "We therefore dismiss as immaterial all considerations

"urged in argument as to the propriety of this legisla-
"tion and consider only the legal effect of the act, and
"the power of the Legislature to enact such a law.

"1. What is the legal effect of the act? The validity
"of the law in this case depends upon its real legal
"effect, and not merely upon its phraseology. In de-
"termining whether any law invades a right secured in
"constitutional enactment, the Court looks at the
"essence as well as the form. (Citing in *re* Applica-
"tion of Clark, 65 Conn. 17).

"The power; 1. To regulate the conduct of all busi-
"ness, harmless in its nature and which every citizen
"has the right to carry on; and 2. To regulate, even
"to the extent of prohibition, any business in its nature
"injurious to the public—is vested in the Legislature
"in the broadest terms; but the exercise of that power
"in the two cases is governed by different principles.
"In the latter case the controlling object is giving to
"the public that protection from danger which the
"State is bound to give, and ordinarily the Legislature
"must be the judge of the degree of danger and of the
"required protection. It may restrict the business by
"requiring large license fees, or by other protective
"regulations; and it may restrict the conduct of the
"business to a limited number of persons, or to persons
"possessing certain qualifications, to be determined by
"public officers to whom the administration of the law
"is given—or, in certain cases, to such persons as these
"public officers may select—thus treating the persons
"intrusted with the business as *quasi* public officers, and
"authorizing their selection on grounds of special fit-
"ness, similar to those applicable to the appointment of
"any State officer or agent. * * *

"But the law in question is not a regulation of a
"business dangerous to the public, and does not come
"within the special principles applicable to such regula-
"tions. It relates to all business 'for the sale of goods,
" 'wares, and merchandise,' to the bread and meat

"essential to the support of life, and to every com-
"modity a human being has need of; the only distinc-
"tion made by the law is that between a business that
"is temporary and transient and all other business. It
"does not define a 'temporary or transient business.'
"Such phrase has no technical legal meaning. The
"natural meaning of the words as generally understood
"does not furnish a definite guide to what the statute
"permits and what it prohibits. Its validity might,
"perhaps, be questioned on the ground that the lan-
"guage used is too vague to constitute and define a
"crime."

So, the statute under consideration falls under the objection here pointed out. It purports to regulate a business which is lawful in itself and which cannot be restrained except in so far as it is actually necessary to promote the general welfare. It fails to define a cattle range, such phrase (as pointed out by the Connecticut Court) has no technical meaning. It is too vague to constitute and define a crime.

Again quoting from State *vs.* Conlin, *supra*:—

"The Legislature has full power to regulate such a
"business, but its regulations must be governed by
"very different principles from those which may gov-
"ern the regulations of a business in its nature danger-
"ous to the public. In the one business no citizen has
"an absolute right to engage; in the other all citizens
"have the right, and an equal right, to engage. The
"difference is vital."

* * * * * * *

"Our bill of rights constitutes the fundamental con-
"dition on which all powers of government can be ex-
"ercised. Its more definite declarations are chiefly con-
"cerned with the administration of justice, especially
"of the criminal law, the preservation of the trial by
"jury, the protection of private property from confisca-
"tion for public use, the right of the citizen to bear

"arms, and the subordination of the military to the "civil power; but the protection of the citizen in the "equal enjoyment of those essential rights belonging to "citizens of a free government is guaranteed, not in "narrow phrases of detailed statement, but in terms as "broad as those which vest the legislative power in the "general assembly, or the judicial power in the Courts. "* * *

"No legislative act is law that clearly and certainly "is obnoxious to the principles of equality in rights thus "solemnly made the condition of all exercise of legis- "tive power. * * *

"The application of the bill of rights, approved in "that case, is plainly necessary to the decision of this; "we entertain no doubt of its correctness, and feel "bound to hold distinctly that an act of the Legislature, "the only legal effect of which is to grant exclusive "privileges in the conduct of an ordinary lawful busi- "ness, in respect to which the government has no ex- "clusive prerogative, is obnoxious to the first section "of the bill of rights and void. There is, in respect to "its validity, no distinction between such a law and one "authorizing such privileges to be granted by subordi- "nate officers in the exercise of a mere arbitray discre- "tion wholy uncontrolled by law."

Louisville & Nashville Rr. Co. *vs.* Commonwealth, 99 Ky. 132, reported in 59 Am. St. Reps., page 457. In this case the Court had under consideration a statute making any railroad corporation which charged more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight within the State guilty of extortion, making the violation thereof a criminal offense. In holding the statute unconstitutional, the Court used the following language:—

"That this statute leaves uncertain what shall be "deemed a 'just and reasonable rate of toll or compen- " 'sation' cannot be denied, and that different juries

"might reach different conclusions, on the same testi-
"mony, as to whether or not an offense has been com-
"mitted, must also be conceded.

"The criminality of the carriers' act, therefore, de-
"pends on the jury's view of the reasonableness of the
"rate charged; and this latter depends on many uncer-
"tain and complicated elements.

"That the corporation has fixed a rate which it con-
"siders will bring it only a fair return for its invest-
"ment does not alter the nature of the act. Under this
"statute it is still a crime, though it cannot be known to
"be such until after an investigation by a jury, and then
"only in that particular case, as another jury may take
"a different view, and, holding the rate reasonable, find
"the same act not to constitute an offense. There is no
"standard whatever fixed by the statute, or attempted
"to be fixed, by which the carrier may regulate its con-
"duct; and it seems clear to us to be utterly repugnant
"to our system of laws to punish a person for an act,
"the criminality of which depends, not on any standard
"erected by the law which may be known in advance,
"but on one erected by a jury. And especially so as
"that standard must be as variable and uncertain as the
"views of different juries may suggest, and as to which
"nothing can be known until after the commission of
"the crime.

"If the infliction of the penalties prescribed by this
"statute would not be the taking of property without
"due process of law and in violation of both State and
"Federal Constitutions, we are not able to comprehend
"the force of our organic laws."

The statute under consideration here is subject to the identical objection so forcefully pointed out by the Kentucky Court. The sheep grower cannot know beforehand what he can and cannot do under this statute. He cannot even know approximately what he can or cannot do because there is no provision in the law whereby it may be determined beforehand that a given section of the country is a

cattle range. Neither does it provide any method of establishing or fixing the exact boundary lines of said range. The determination of these two facts are necessary before the sheep grower can know or before any one else can know whether or not the statute has been violated. In every instance, it must be left for the jury to determine after the act itself has been done whether or not the facts existed which are necessary before there can be a violation of the statute.

Quoting further from the same case:—

> "In Louisville Rr. Co. *vs.* Railroad Commission, 19 "Fed. 679, the learned Judge, reviewing a statute very "similar to the one under consideration here, said:—
>
> "Penalties cannot be thus inflicted in the discretion "of the jury. Before the property of a citizen, natural "or corporate, can be thus confiscated, the crime for "which the penalty is inflicted must be defined by the "law-making power. The Legislature cannot delegate "this power to a jury. If it can declare it a criminal "act for a railroad corporation to take more than a fair "and just return on its investment, it must in order to "validate the law define with reasonable certainty what "would constitute such fair and just return. The act "under review does not do this, but leaves it to the jury "to supply the omission."

The same is true of the statute under consideration here. It does not define a cattle range nor provide for the fixing of the boundary lines. If the Legislature had provided, as in the case of establishing herd districts, that, whenever any cattle growers desired to have a given district judicially declared to be a cattle range, they file their petition with the proper authorities, and, after a public hearing, a certain territory to be declared to be a cattle range, describing it by fixing the boundary lines, then we would have an entirely different situation. Such action and the records made thereby would be notice to the world that said range existed. But such is not the case. A sheep grower has no means of

knowing whether or not a cattle range exists and where the boundary lines are located. Therefore, he cannot know in advance when he is about to violate the law, nor when he has violated it.

Quoting further from the same case:—

"Mr. Justice Brewer, in the case of Virginia etc., "Co. *vs.* Dey, 35 Fed. 866, had under consideration the "provisions of a statute similar to the one we have "before us and, while the statute was upheld, it was "only because there was a schedule of rates provided in "the act which rendered the test of reasonableness defi- "nite and certain. The learned Judge said:—

"Now the contention of complaint is that the sub- "stance of these provisions is that, if a railroad com- "pany charges an unreasonable rate, it shall be deemed "a criminal and punished by a fine, such a statute is too "indefinite and uncertain, no man being able to tell in "advance what, in fact, is, or what any jury will find "to be, a reasonable charge. If this were the construc- "tion to be placed upon this act as a whole, it would "certainly be open to complainant's criticism, for no "penal law can be sustained unless its mandates are so "clearly expressed that any ordinary person can deter- "mine in advance what he may and what he may not do "under it."

"In Dwarris on Statutes, 652, it is laid down that " 'it is impossible to dissent from the doctrine of Lord " 'Coke, that acts of Parliament ought to be plainly " 'and directly penned, especially in legal matters.' "

And the learned Judge concludes that:—

"There is very little difference between a provision "of the Chinese penal code which prescribes a penalty "against anyone who should be guilty of improper con- "duct and a statute which makes it criminal offense to "charge more than a legal rate."

The same Judge, discussing the kindred subject of reasonable difference in rates, in the case of Toser *vs.* U. S. 52 Fed. Rep. 917, said:—

> "But, in order to constitute a crime, the act must be "one which the party is able to know in advance "whether it is criminal or not. The criminality of his "act cannot depend upon whether a jury may think it "reasonable or unreasonable. There must be some de- "finiteness and certainty. When we look to the other "side of the question, we find the contention of the "State supported by neither reason nor authority. No "case can be found, we believe, where such indefinite "legislation has been upheld by any court where a crime "is sought to be imputed to the accused."

In Knight *vs.* Trigg, 16 Idaho 256, the Court, in passing upon a statute providing for the holding of a special election, where the statute was attacked upon the grounds of uncertainty and incompleteness, used the following language:—

> "To attempt, however, to hold an election under the "provisions of Section 2 of this Act, would be to under- "take the exercise of purely political and ministerial "functions, surrounded with much ambiguity, uncer- "tainty and doubt, and would undoubtedly entail con- "fusion, dissatisfaction and possibly future litigation. "At the same time, much that would necessarily have "to be done by the election officers in the discharge of "the duties of preparing for and holding an election "would have to be left to their discretion and judgment, "different officers having different views, without any "clear or positive legislative enactment to direct them "or control their conduct. Under such circumstances "we are clearly of the opinion that it is the duty of the "Court to hold Sec. 2 of this Act void and inoperative "for uncertainty, ambiguity and incompleteness. Un- "der this Act one class of persons might be permitted to

"vote in one precinct and be excluded in another, and "in still another persons might be permitted to vote who "have ceased to be citizens, while citizens and electors "might be denied the right of registration."

In the case of Anderson *vs.* Great Northern Railway Co., 25 Idaho, 433; 138 Pac., 127, the Court, having under consideration a statute which provides that all persons or corporations furnishing supplies to those engaged in getting out logs or timber should have a lien upon the logs, used the following language:—

"It furnishes the owner of the property no notice "and accords him no method of protecting himself "against any such claim, and charges him with a claim "which may equal or exceed the value of the property "although he has paid the contract price to the men "who actually did the labor. In these respects, it un- "doubtedly has the effect of taking property without "due process of law. * * * There is no means "afforded for the property owner to learn who has "furnished groceries, supplies or necessaries to the "contractor or men until after his liability has attached "for laborers and material men's liens if he has not "in the meanwhile paid them in full."

In State *vs.* Smith, 42 Wash. 237, 84 Pac. 851, 114 Am. St. Reps. 114, the Supreme Court of Washington, having under consideration a statute regulating plumbing in cities having a population of ten thousand inhabitants or over, providing for the licensing of persons to carry on the business and work of plumbing, creating a board of plumbing examiners, etc., spoke as follows:—

"The power of the Legislature to make all need- "ful rules and regulations for the health, comfort and "well-being of society cannot be questioned, but there "are certain limits beyond which the Legislature can- "not go, without trenching upon liberty and property

"rights which are safeguarded by the State and Federal "constitutions. * * *

"And in *re* Aubrey, 36 Wash. 308, 104 Am. St. Rep. "952, 78 Pac. 900, this Court said: 'It may be stated, " 'as a general principle of law, that it is the province " 'of the Legislature to determine whether the condi- " 'tions exist which warrant the exercise of this power; " 'but the question, what are the subjects of its ex- " 'ercise? is clearly a judicial question. One may " 'be deprived of his liberty, and his constitutional " 'rights thereto may be violated, without the actual " 'imprisonment or restraint of his person. "Liberty," " 'in its broad sense, as understood in this country, " 'means the right, not only of freedom from actual " 'servitude, imprisonment, or restraint, but the right " 'of one to use his faculties in all lawful ways, to live " 'and work when he will, to earn his livelihood in any " 'lawful calling, and to pursue any lawful trade, or " 'avocation. All laws, therefore, which impair or " 'trammel these rights * * * which limit him in " 'his choice of a trade or profession * * * are " 'infringements upon his fundamental rights of liberty, " 'which are under constitutional protection.' * * *

" 'The purpose of a statute must be determined from " 'the natural and legal effect of the language em- " 'ployed; and whether it is or is not repugnant to " 'the Constitution of the United States must be de- " 'termined from the natural effect of such statutes " 'when put into operation, and not from their pro- " 'claimed purpose. * * * The Court looks be- " 'yond the mere letter of the law in such cases.' "Lochner *vs.* New York, 198 U. S. 45, 25 Sup. Ct. "Rep. 539, 49 L. ed. 937. * * *

"The public health is entitled to consideration at "the hands of the legislative department of the gov- "ernment, but it must be remembered that liberty does "not occupy a secondary place in our fundamental law.

"Root, J., concurring. To the foregoing may be "added this thought: The liberty and natural rights of

"a citizen—such as his privilege to engage in a law-
"ful vocation for a livelihood—can be denied him by
"the Legislature only where such deprivation is neces-
"sary to accomplish a given result essential to the wel-
"fare of the public. If that result can be attained in
"a practical manner without interference with such
"liberty and rights, there is an absence of that neces-
"sity which is an essential and prerequisite to the valid-
"ity of such a statute.

"In the case at bar, the only justification urged in
"behalf of the statute is that good plumbing is neces-
"sary to the health of people in cities having over ten
"thousand inhabitants. Avowedly, it is sought to in-
"sure good plumbing by means of this statute. It is
"self-evident that the same or a better result can be
"obtained by means of statutes or ordinances requiring
"good plumbing, and insuring it by means of adequate
"inspection. Such a statute or ordinance would not
"interfere with the liberty or natural rights of any
"person, and would safeguard the health as fully as,
"or more so than, the statute now in question. It
"therefore follows that the liberty and natural rights of
"the individual are infringed by this statute unneces-
"sarily and, consequently, unconstitutionally."

In State *vs.* Cudahy Packing Company, 33 Mont. 179, 82 Pac. 833, 114 Am. St. Reps. 804, the Supreme Court of Montana, having under consideration a statute making it a crime for any person or persons to directly or indirectly combine or form what is known as a trust, for the purpose of fixing the price or regulating the production of any article of commerce or of commerce or of the products of the soil consumed by the people, quotes, with approval, the following:—

"Yick Woo *vs.* Hopkins, 118 U. S. 356, 6 Sup.
"Ct. Rep. 1064, 30 L. ed. 220, in which it was said
"that 'the equal protection of the laws is a pledge
"'of the protection of equal laws,' herein declaring,

"in substance, that not only must the law as enacted "furnish equal protection to all, but also that the "Legislature, in enacting any law, must so adjust its "provisions that it will operate equally upon the indi- "viduals constituting the class of citizens whose con- "duct it is intended to control. In the Illinois act "the exception applies to agriculturalists and livestock "raisers. The exception in our statute applies to those "engaged in agriculture and horticulture; but this "slight difference does not affect the point at issue.

"Though there might be difference of opinions as "to the proper interpretation of the Fourteenth Amend- "ment, if it were a new question, these decisions of "the Court of last resort are binding upon this Court, "and, under the mandate of the Constitution of the "United States, are the supreme law of the land. Ac- "cepting them as such, we must conclude that the legis- "lation is void, unless Section 325 can be eliminated, "leaving Section 321 in operation. * * *

"It would certainly be dangerous if the Legislature "could set a net large enough to catch all possible of- "fenders, and leave it to the Courts to step aside and "say who could be rightfully detained, and who should "be set at large. This would, to some extent, sub- "stitute the judicial for the legislative department of "the government."

The same objection is valid against the statute under consideration; it sets a net large enough to catch all possible offenders and leaves it to the juries to say who shall be rightfully detained and who shall be set at large.

In the case of Louisville & N. R. Co. *vs.* Railroad Commission, 19 Fed. at page 679, the Court had under consideration the validity of an act which made it a crime for a railroad company to charge more than a "just and reason- "able compensation" for its services or to make any "unjust "or unreasonable discrimination."

"The Legislature cannot delegate this power to a jury. "If it can declare it a criminal act for a railroad cor-

"poration to take more than a 'fair and just return,'
"on its investments, it must, in order to the validity of
"the law, define with reasonable certainty what would
"constitute such 'fair and just return.' The act under
"review does not do so, but leaves it to the jury to sup-
"ply the omission. No railroad company can possibly
"anticipate what view a jury may take of the matter,
"and hence cannot know in advance of a verdict
"whether its charges are lawful or unlawful. One jury
"may convict for a charge made on a basis of four per
"cent., while another might acquit an accused who had
"demanded and received at the rate of six per cent.,
"rendering the statute, in its practical working, as un-
"equal and unjust in its operation as it is indefinite in
"its terms. No citizen, under the protection of this
"court, can be constitutionally subjected to penalties and
"despoiled of his property, in a criminal or *quasi* crim-
"inal proceeding, under and by force of such indefinite
"legislation."

It is well known that at the time of the enactment of this statute the cattle men were in control of all the ranges of the State, that a very large portion, if not all of these ranges, were occupied by cattle prior to their occupancy by sheep, and if the statute had been successfully enforced at that time, it would have excluded sheep from the public ranges in the State, but such was not the case, for in 1888 an attempt was made to enforce the statute of injunction, which failed, see McCinnis, *et al.*, *vs.* Friedman, 2 Idaho, 393; 17 Pacific 635, wherein the Supreme Court of the State held, that in view of the Act of Congress, of February 25th, 1885 (23 U. S. Statutes at Large 321) the right of prior possession, given in Section 6873, would not be enforced by a Court of Equity. From that time on the sheep men were permitted to graze their sheep upon large areas of the public range, the cattle men thereby abandoned such ranges as exclusive cattle ranges thereby repealing the statute in all such territory. In the case of State of Idaho *vs.* A. G. Butter-

field, reported in the advance sheets of the Pacific Reporter, June 25th, 1917, Vol. 165, No. 1, at page 218, wherein the Court had under consideration Section 6872, the facts in that case as stipulated show that for more than twenty years the range had been jointly used by both cattle and sheep but that said range had been previously occupied by cattle, the defendant was convicted in the trial Court. In reversing the judgment of the trial Court, the Supreme Court said:—

> "The defendant requested several instructions on the "question of abandonment, among others the follow-"ing:
>
> " 'The jury are instructed that, if you find from the " 'evidence that continuously since the year 1885 the " 'range or tract of land mentioned in the complaint " 'has been jointly used both as a cattle and sheep range " 'in the usual and customary use of such range, then " 'you should take this fact into consideration upon the " 'question as to whether or not such range had been " 'abandoned as an exclusive cattle range.'
>
> "This and all other instruction on that question re-"quested by the defendant were refused by the trial "Court. The trial Court instructed the jury upon the "question of abandonment, saying that the State must "show that the range had not been abandoned as a "cattle range, and that, if the evidence proved that it "had been abandoned as a cattle range, the verdict "must be for the defendant. The trial Court did not "define in its instructions what is meant by the word " 'abandonment,' as used in this action. In the case of "State *vs.* Omaechevviaria, 27 Idaho, 797, 152 Pac. "280, this Court apparently recognizes the defense of "abandonment in this class of cases, saying in substance "that the State must show that the range had not "been abandoned as a cattle range. The defense of "abandonment was not made in that case, and there-"fore the Court did not enter into a detailed discussion "of that subject. The trial Court in this case followed

'substantially the language used by the Supreme Court 'in State *vs.* Omaechevviaria, *supra*. However, in the "present case the defense of abandonment was specifi- "cally raised by the defendant, and the evidence pro- "duced makes it necessary to treat specifically of that "question.

"The statute says that:—

" 'Priority of possessory right * * * is deter- " 'mined by the priority in the usual and customary use " 'of such range.'

"If the usual and customary use of the range has "been for cattle, then it is a cattle range. If the usual "and customary use of such land has been by both cattle "and sheep, then it is not a cattle range, but a cattle "and sheep range. It is the contention of the State in "this case that, if the range is first used for cattle, then "the joint use of the range by cattle and sheep for a "period of time however long will not divest it of its "character as a cattle range. The State contends that "the defense of abandonment does not apply unless the "cattle men absolutely and entirely cease to use the "range for cattle. The first part of Section 6872 may "seem to give some color to this contention. The last "part of it, however, seems to be against this conten- "tion. If the priority of possessory right depends "upon the usual and customary use of the range, and "the range has been used for a time long enough to "create a custom by both cattle men and sheep men, "without any protest on the part of the cattle men, then "it would seem that the usual and customary use of that "range is a joint use by both sheep and cattle. The "right which is given the cattle men by this statute is "an exclusive right as against sheep men to certain "ranges which they first use for cattle. The term " 'cattle range,' as used in this statute means an exclu- "sive cattle range. If the exclusive right can be aban- "doned by the act of the cattle men in entirely ceasing "to use the range, it seems to us that it can also be "abandoned by them by permitting the customary graz-

"ing of sheep upon the land in common with the cattle "without protest. Evidence tending to show that they "had permitted the sheep men to use said range jointly "with them since 1885, without protest, is therefore "evidence tending to show that said range had been "abandoned as a cattle range. If cattle men and sheep "men jointly use the range in the usual and customary "manner of using it for a period of time long enough "to create a custom, if the cattle men know of such "joint use and do not protest against such use of the "range for sheep, nor claim a prior and exclusive right "to the same, then the herding or grazing of sheep upon "such range is not unlawful, even though it be a fact "that, before such customary joint use for both sheep "and cattle, the land was used exclusively for cattle. "We therefore think that the Court should have given "to the jury the instruction requested by the defendant "and quoted above, to the effect that they might take "proof of the joint use of the range into consideration "in determining whether or not the cattle men had "abandoned their claim to the range as a cattle range."

Under the above construction it is obvious that it is within the power of those running cattle upon the public range to legislate for the territory upon which they graze their cattle.

In the case of Jannin *vs.* State, 42 Tex. Crim. Rep. 631, 53 L. R. A. 349, the Court had under consideration an act of the Legislature making it a penal offense for any one other than agents of a railway company to sell tickets. But the act also provided that this provision should not apply to any person holding a ticket upon which is not plainly printed that it is a penal offense for him or her to sell or transfer said ticket. This law was held invalid for the reason that it gave the railroad company the option of creating a penal offense. If they printed the proviso in the statute upon the ticket, an offense was created. If they omitted to print this proviso, no offense was committed. And in the opinion of the Court, it is said:—

"It would have been a very easy matter for the "Legislature to have confined the sale of all passage "tickets to the agents of the railroad companies, with- "out any requirement as to the form of the ticket. But "this course was not pursued. As it is, every rail- "road company has the option to issue a passage "ticket with this proviso or not, as it may see proper. "If it issues a ticket without this proviso, it is not "a penal offense, and in every such case scalpers "and all others may deal in such passage tickets with- "out any violation of the law. We accordingly hold "that because the Legislature left it optional with the "railroad companies whether or not, in the issuance "of tickets, they would create a penal offense that the "act of the Legislature is without authority of law, "is violative of the law, in that it does not define with "certainty an offense; does not itself create an offense, "but delegates its authority to another agency to make "the sale of railroad tickets a violation of the law."

It will doubtless be contended that because the statute commonly know as the two-mile limit law was by this Court held to be a valid exercise of the police power that it follows naturally that this statute is valid, but there is a vast difference in the two statutes, First, the statute under consideration is a penal statute and the two-mile limit law is civil and a different rule of construction applies.

A civil statute will be given a liberal construction so as to carry out the intent and purpose of the Legislature, while a penal statute (which deals with the liberties of the citizen) will be strictly construed against the State and all doubt will be resolved in favor of the defendant.

Second, the two-mile limit law erects a standard to guide those grazing sheep upon the range. Among other things, it provides that any one grazing sheep within two miles of an inhabited dwelling is liable in damages to the owner of such dwelling. The boundary lines are fixed; there is the dwelling house in view; a warning, something visible,

something to make one approaching such a dwelling conscious of his act, while the statute under consideration is so vague, uncertain, and incomplete that no one can know when he is about to commit the trespass prohibited by its terms. Had the Legislature gone further (as the Legislature of Montana did in the enactment of a similar statute) and completed the act by providing for the marking out of the boundaries and posting notices, then our objection to the incompleteness and uncertainty of the Idaho Statute would be met. Section 8474 of the Montana Act is as follows:—

> "It shall be unlawful for any person or persons to "wilfully drive, or cause to be driven, any livestock "held in herd, on or over any field, ranch property or "valid claim in process of title under any of the land "laws of the United States, or under lease from the "State of Montana, whether the same be fenced or not; "provided, that any lands so owned, or under process "of title, or under lease, and not fenced, shall be "clearly defined by suitable monuments or stakes and "plough furrows, with printed or written notices indi- "cating the land so held."

Section 8475 of the same Act provides for the imposition of a fine, when upon complaint of the owner, a defendant is found guilty of any of the acts declared unlawful, in Section 8474.

The Montana statute is quoted only for the purpose of illustrating the principle for which we are contending, to wit:—

That a penal statute must be certain, definite and complete; that it must define the acts prohibited, or if it is to apply to certain given areas and not to others, then it must clearly define those areas to which it is to apply. The application or non-application cannot be left to the arbitrary action of an individual or a group of individuals. That Section 6872 of the Revised Codes of Idaho, falls far short of being definite, certain and complete is obvious. If a

cattle man or a group of cattle men claim the right to the exclusive use (as against sheep men) of a certain range, then it becomes a criminal offense to graze sheep upon that range, but the moment such a claim is made, it becomes necessary to supplement the statute by supplying that which is not there, that is to say, a method of fixing the territorial limits of said range. This omission must be supplied by the arbitrary action of either the cattle men, the public prosecutor, or the jury. That in the first instance the cattle men fix the boundaries is borne out by the record. The witness, George Swisher (who was the complaining witness) on cross examination, testified on that subject as follows:—

> "We discussed it among ourselves. It has been dis-
> "cussed among some of us just prior to this complaint.
> "I didn't have to claim the range as a cattle and horse
> "range. It was already that. I agreed with those
> "who took part in the discussion that we would claim
> "it as an exclusive cattle range; and we agreed upon
> "the lines as indicated in State's Exhibit 1. We did
> "not mark out the boundaries of their range on the
> "ground and we erected no monuments, only by can-
> "yons, the creeks and rivers.
>
> "Q. Did you put up notices on the ground that that
> "was claimed as an exclusive cattle range? A. No,
> "sir, but we went and interviewed those people before
> "they came there and before they crossed those lines
> "that we speak of, or boundaries, I did not notify Mr.
> " that I had established those lines; I
> "notified his herder, the defendant in this case. I noti-
> "fied other sheep men that I had established the lines
> "and where the lines were. I have been notifying them
> "for six years, ever since I have been there, strangers
> "that came in." (Printed Record, page 24, ff. 39.)

The witness, E. A. Stauffer, also testified on this subject and on cross examination, testified as follows:—

"I first established, or assisted in establishing the ex-
"terior boundaries of this cattle range, as indicated on
"State's Exhibit 1, along about twelve years ago. I
"did not erect any monuments, in particular, it wasn't
"necessary. The sheep men that were in there at that
"time all knew the creeks, and it was more bounded by
"the creeks—more than anything else, and mountains.
"I didn't put up any stakes with notices on them
"that that was the line of a cattle range. It wasn't
"necessary. * * * *

"In order that the sheep men might know the loca-
"tion of the boundary lines of that cattle range it was
"necessary for me or some one to notify each man as
"he approached the line with his sheep. I did not notify
"Mr. Bicknell, the owner of the sheep which were in
"charge of the defendant, of the establishment of the
"lines indicated on State's Exhibit 1. I never saw Mr.
"Bicknell until yesterday, but his camp tender has
"known real well where the lines are. I didn't person-
"ally notify the defendant, the herder of the sheep,
"where the lines were. As to my authority in assisting
"to establish the boundary lines of this cattle range, I
"just took it onto myself, the fact of living there and
"owning a place in there and running stock and seeing
"sheep men and talking to them and being agreeable to
"them, to respect these boundary lines, or a certain por-
"tion of the country, which they have done. I have
"claimed legal right to the pasture growing on the range
"described in the complaint, if there is any legal right
"in pasturing stock upon a public range; the fact of
"living and owning land and having a prior right—I
"would consider that a legal right. I think I have a
"right to pasture cattle on there. I discussed with Mr.
"Swisher and the other men named in the complaint
"the question of the boundaries of the range as de-
"scribed in the complaint. This boundary here has been
"established in a way for over twelve years. We con-
"tend that everything within the boundaries is cattle

"and horse range, and with the exceptions, as I say, "of a spot there where sheep have went, it has been ex- "clusively cattle and horse range, never been used for "anything else. We have not recently put up any monu- "ments to mark the exterior boundary lines of that "range so they would be visible to men approaching "them, but then, years ago there was trees blazed and "the boundary line was known by the road and creeks, "as I stated before; we didn't have to put up any monu- "ment."

Printed record, pages 34 and 35, ff. 55 and 56.

The testimony quoted shows clearly how the omissions of the statute are supplied and how arbitrary is its operation when applied to the actual conditions existing on its public range.

It will be urged as was said by the Court in State *vs.* Omaechevarria, printed record, page 63, ff. 106:—

> "That the character and area of a cattle range are "to be determined by its priority of use in the usual "and customary manner as such."

We are not willing to concede such to be the case. How is one to determine the character of the range? Is the use of the range by one, two, five, or ten head of cattle sufficient to fix its character; and are the territorial boundaries of the range to be fixed by the wanderings of one, two, five, or ten head of cattle? When we remember that it is lawful to engage in the sheep industry; that it is lawful to graze sheep upon the public domain and that the industry is a great public benefit, it would seem reasonable to inquire whether or not a citizen grazing his sheep upon the public range must search the earth for cow tracks and stop when he finds the first one, or will he search for sheep tracks and stop when he comes to the last one? How is a law-abiding citizen going to obey this law without surrendering some of the rights and privileges guaranteed to him by the supreme law of the land.

Coming to the question of the conflict of Sec. 6872 with the Act of Congress of February 25th, 1885 (23 U.

S. Statutes, at Large 321), we quote Sec. 1 of said Act in full:—

> "(Inclosure of or assertion of right to public lands "without title unlawful.) That all inclosures of any "public lands in any State or Territory of the United "States, heretofore or to be hereafter made, erected, or "constructed by any person, party, association, or cor- "poration, to any of which land included within the in- "closure the person, party, association, or corporation "making or controlling the inclosure had no claim or "color of title made or acquired in good faith, or an "asserted right thereto by or under claim, made in "good faith with a view to entry thereof at the proper "land office under the general laws of the United States "at the time any such inclosure was or shall be made, "are hereby declared to be unlawful, and the main- "tenance, erection, construction, or control of any "such inclosure is hereby forbidden and prohibited; "and the assertion of a right to the exclusive use and "occupancy of any part of the public lands of the "United States in any State or any of the Territories "of the United States, without claim, color of title, or "asserted right as above specified as to inclosure, is like- "wise declared unlawful, and hereby prohibited."

The Supreme Court of Idaho had under consideration this act in connection with Section 6872, Revised Codes of Idaho. McGinnis *et al. vs.* Friedman, 2 Idaho, 393; 17 Pac. 635, was a case wherein McGinnis undertook to restrain Friedman from herding his sheep upon a range which had been used for several years by McGinnis as a winter range for his cattle. A temporary restraining order was issued, and, upon the hearing in the District Court, said order was dissolved, whereupon McGinnis appealed to this Court. After discussing the jurisdiction of a Court of Equity, the Court used the following language:—

> "The appellants claim, however, that they have held "these ranges for several years, and therefore they hold

"the same now under an adverse possession, as to "this respondent, from entering thereon with his sheep. "We think a Court of Equity should not interfere to "enforce such a claim by injunction, in view of the Act "of Congress of February 25, 1885 (23 U. S. Stats. "at Large, page 321), which provides, in substance, "among other things, that the assertion of a right to "the exclusive use and occupancy of any part of the "public lands of the United States without claim, color "or title, or asserted right, as therein specified, is de- "clared to be unlawful, and therefore prohibited. "When we take into consideration the object, purpose, "and spirit of that law, and the fact that appellants "do not claim to hold by virtue of any of the posses- "sory acts, but only by their right of prior possession, "we think that said Act of Congress is a complete "answer to all authorities cited and arguments urged "upon that point. If, therefore, the action cannot be "maintained because appellants have no legal or equi- "table title to the pasture in dispute, we think that the "second ground urged that the threatened act will be "a violation of the Revised Statutes before quoted, is "equally untenable; * * *."

In the case of United States *vs.* Douglas-Willan Sartoris Co., 3 Wyo. 287, 22 Pac. 92, the Supreme Court of Wyoming had under consideration the act above quoted. The Court, in passing upon this statute, used the following language:—

"The act under which the suit is prosecuted forbids "two things: (1) The inclosure referred to; and (2) "the assertion of a right to the exclusive use of public "land without right or color of right. The actual use, "as distinguished from the assertion of the right to "use, is not forbidden."

In Taylor *et al. vs.* Buford *et al*, 8 Utah 113, 29 Pac. 880, the Supreme Court of Utah, in passing upon the Act

of February 25th, 1885 (*supra*), used the following language:—

> "The fencing of the public land is unlawful, whether "included with lands of private parties or corporations; "and the same act that declares the fencing of public "lands unlawful, and Section 3 of the same Act, Feb. "25, 1885, provides among other things. 'Nor shall " 'any person prevent or obstruct free passage over or " 'through the public lands.' I Comp. Laws, 239, 240. "The policy of the government has been from the first "to hold the unappropriated public lands as a great free "common, for all the settlers of the country, where "they lie, and for the exclusive use of no one. The "whole drift of the opinion by Miller, J., in the case "of Buford *vs.* Houtz, 133 U. S. 320, is that unappro- "priated lands of the United States are kept by the "government for the benefit of the people who may "wish to use them for pasturage, and no one has the "right to the exclusive use of them."

In the case of United States *vs.* Buford, *et al*, 30 Pac. 433, 8 Utah 173, the Supreme Court of Utah, in passing upon the Act of February 25th, 1885 (*supra*), at page 434, uses the following language:—

> "If the grantees of these railroad lands inclosed pub- "lic lands so as to prevent the public from entering "upon them for settlement, or other lawful purpose, "even if done by placing the fence that constitutes the "enclosure all on their own lands, they violate the law, "and should be held guilty; for they have no right to "exclude the public from the public lands at all, in any "way whatever."

In State of Idaho *vs.* Butterfield, *supra*, the Court in discussing the right given the cattle men by Section 6872, at page 219, said:—

> "The right which is given the cattle men by this "statute is an exclusive right as against sheepmen to "certain ranges which they first use for cattle."

In view of the language just quoted, it is obvious that Section 6872 of the Revised Codes of Idaho, attempts to assert for the cattle men the very thing which is prohibited by Section one of the Act of Congress of February 25th, 1885, *supra*, that is the right to the exclusive use of a part of the public lands of the United States.

To recapitulate the plaintiff in error contends:—

First.—That the Idaho statute is in form and effect an attempt to define and limit in respect to each other what it wrongfully calls the possessory rights of cattle and sheep owners on land which belongs to the United States and in which all the people have equal rights.

Second.—That it limits and abridges the rights of use by the sheep owners of such public lands and gives under certain conditions exclusive rights to the cattle owners and is therefore unconstitutional.

Third.—That even if the State of Idaho could regulate as between different classes of users having equal rights the use of public lands, the statute in question is so arbitrarily unreasonable and unjust as to be a wrongful deprivation of the equal rights of the sheep owners.

Fourth.—That even if the Idaho statute was not unconstitutional for the above reasons it is an attempt to regulate the relative rights of persons on public lands as to which Congress has sole jurisdiction and with respect to which Congress has already legislated.

Fifth.—That the Idaho statute is in direct conflict with the Act of Congress prohibiting the assertion of exclusive rights in the public lands.

SHAD L. HODGIN,
FRANK P. PRICHARD,
Attorneys for Plaintiff in Error.

SUBJECT INDEX

LIST OF CASES REFERRED TO

Supreme Court of the United States

OCTOBER TERM, 1916

Secundino Omaechevarria,
Plaintiff in Error
vs.
State of Idaho

In Error to the Supreme Court of the State of Idaho

BRIEF OF DEFENDANT IN ERROR

The plaintiff in error was convicted of a violation of Section 6872 of the Revised Codes of the State of Idaho (1908), which act reads as follows:

> "Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any

> range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

The plaintiff in error set up the unconstitutionality of the act and its invalidity as a police measure, but on appeal to the Supreme Court of Idaho the conviction was affirmed and the invalidity of the statute denied in the opinion incorporated into the record in this proceeding (Record, pages 57-63). The case was thereupon brought to this court on writ of error.

Disregarding the order of the specifications of error in the brief of opposing counsel, it is contended on behalf of plaintiff in error that the statute above quoted is void,

First: because it is in conflict with the Act of Congress of February 25th, 1885 (23 Stat. L., 321),

Second: because it violates the provisions of Section 1 of the 14th amendment to the Constitution of the United States, in that it deprives plaintiff in error of property without due process of law and denies him the equal protection of the laws, and,

Third: because it is so indefinite and uncertain in its terms as to deprive him of liberty and property without due process of law.

These questions will be considered in the order above stated. The statute is, of course, limited in its operation to the grazing of sheep upon the public domain.

The punishment not being provided in the statute itself, the provisions of Sec. 6313 of the Idaho Revised Codes (1908) apply, wherein it is provided that every offense declared to be a misdemeanor shall be punishable by imprisonment in the county jail not exceeding six months or by a fine of not exceeding three hundred dollars, or by both.

I. POWER OF THE STATE TO REGULATE GRAZING PRIVILEGES ON THE PUBLIC LANDS.

A discussion of the validity of this act should begin with an investigation of the nature of the right or license to pasture stock upon the public lands, and of the authority of the state to limit and control the exercise of such right. The Congress of the United States has never granted the right to graze stock upon the public domain. For many years, however, the public lands have been utilized for grazing purposes without objection on the part of the Federal Government. This acquiescence on the part of the Federal authorities has given

rise to an implied license or a sufferance to so occupy the public lands. But it should be kept in mind that no right in the nature of a grant exists. Like all implied licenses, this license to graze merely exempts the licensee from prosecution for trespass.

Within the boundaries of a state, the general government has, with respect to its own lands, the rights of an ordinary proprietor, and it is unquestionably within the power of Congress to grant or to withhold the right to graze, and to regulate and to control the pasturing of the public domain. Such regulations have been adopted in the national forests created by Congress. Outside of such reserves, however, no attempt has been made to regulate or to control the use of the public lands for grazing purposes. Until such control is exercised by the general government it seems clear that the individual states, in the exercise of their police power, have the right to pass such laws as will insure the public peace and prosperity through the adjustment and accommodation of range privileges.

The Supreme Court of Idaho, in the case of Sweet vs. Ballantyne, 8 Idaho, 431, 69 Pac. Rep. 995, says:

> "We cannot concede that the police power of the State does not extend over the public domain."

In the brief of counsel for appellant the case of Buford vs. Houtz, 133 U. S. 320, is cited as authority for the proposition that the right of all parties to use the public land of the United States for grazing purposes, if any such right exists, is equal. The correctness of this statement is not disputed. The case of Buford vs. Houtz, however, is primarily authority for the proposition that the control of such grazing rights as exist is with the state. In discussing the matter of fence and herd laws in the western states, this Court in that action uses the following language:

> "Whatever may be the result of this current agitation (as to herd laws) it can have no effect upon the present case, as the law of Utah and its customs in this regard remain such as we have described it to be in the general region of the northwest, and the privileges accorded by the United States for grazing upon her public lands are subject alone to their control."

See also Northern Pacific Ry. Co. vs. Cunningham 89 Fed. 594.

It is of the very essence of this decision that the privileges which citizens have of grazing

their stock upon the public domain are subject to regulation and control on the part of the State governments.

This Court in the case of Bacon vs. Walker, 204 U. S. 311,315, 27 Supreme Court Reporter, 289, effectually disposes of this subject in the following language:

> "Is it true, therefore, even if it be conceded that there is right or license to pasture upon the public lands, that the State may not limit the right or license? Defendants in error have an equal right with plaintiff in error *and the State has an interest in the accommodation of those rights. It may even have an interest above such accommodation.*" (Italics ours.)

The above case disposes of the question by conceding to the State governments, not only the right to accommodate the grazing privileges of different classes of stock on the public lands, but by declaring that the State has an interest which is superior to the rights either of cattle or sheep owners.

From the foregoing authorities, it must, we believe, be conceded that, except where the United States government exercises such police power as is necessary to protect its interests as a land owner, the State has full power

to regulate the policing of the public domain and to accommodate and to control the grazing privileges thereon. The State not only has an interest in the accommodation of grazing privileges as between different classes of stock, but it may have an interest above such accommodation. Where the public peace and order, or the prosperity and well being of the State demand it, the State not only has the power, but it is its duty to make such regulations and restrictions as may be necessary or desirable.

It is contended, however, that the authority of the State to regulate grazing privileges on public lands has been withdrawn by the Congressional act of February 25, 1885 (Chapter 149, 23 Stat. L. 321; U. S. Comp. St. 1913, pars. 4997-5002).

An examination of the circumstances leading up to the adoption of the Act of Congress. and of the reasons for passing the same, will throw some light upon the question as to whether or not it is contravened by the statute before the Court. It is clear that as a land owner the United States Government may exercise over the public domain within the boundaries of a State the same control as may be exercised by any other property owner. The general government has the right to prevent

trespass upon and to maintain its control over the public lands, or to sell, lease and dispose of the same in any manner it sees fit. As the holder of the legal title to the public lands, the Federal Government is trustee for the entire people. It has been its policy since a very early date to treat the public lands, not as a source of revenue, but as trust property, to be disposed of to individual citizens who may seek to settle upon them, enter them under the public land laws or purchase them from the government. Witness the numerous laws that have been passed by Congress in relation to the entry, settlement, pre-emption, reclamation and sale of the public lands.

Sometime in the sixties a decision was rendered by this Court in the case of Atherton vs. Fowler, 96 U. S. 514, which was construed to hold that no entry or settlement could be made upon, or preemption right acquired to, public lands in the prior possession of another, and this regardless of the qualifications of the prior possessor or of the legality of his possession. The influence of *dicta* found in this decision is still strong among the Courts of many western states, notably California, Nevada and Arizona. Partially as the result of the decision in that case,

it became a common practice in the western states for stock men to fence large areas of the public lands, thereby keeping out settlers. Numerous cases arose where stockmen conspired together to assert an exclusive right to the most available public lands, thus frightening off intending settlers and interfering seriously with the operation of the public land laws. To correct this abuse, the Act of Feb. 25, 1885, was passed by Congress.

That Act is to a large extent superfluous. It is largely declaratory of what the law already was, because the general government as a land owner had, as an incident to its ownership, the right to abate as a nuisance fences placed upon its lands and had the authority to enjoin any person from asserting or exercising an exclusive right to the use of those lands. For the exercise of its authority in this behalf no legislation was necessary. The Act, however, extends somewhat the power of the general government and also provides means for enforcing its rights as a land owner and prescribes penalties for the infraction of those rights.

Judge Brewer, in the case of United States vs. Cleveland Cattle Co., 32 Fed. 323, uses this language:

"Its probable intent and purpose was to call the attention of the officers of the government to the increasing evil of fencing up the public domain and perhaps also to vest jurisdiction in some Courts which may not have had jurisdiction over such litigation."

In Camfield vs. United States, 167 U. S. 518, the Court uses the following language:

"While the lands in question are all within the State of Colorado the Government has with respect to its own lands the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farm property. It may sell or withhold them from sale. It may grant them in aid of railroads or other public enterprises. It may open them to preemption or homestead settlement; but it would be recreant to its duty as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain and thereby practically drive intending settlers from the market. It needs no argument to show that the building of fences upon the public lands with intent to enclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the Government or by the ordinary processes of the Courts of Justice. To this extent, no legislation was necessary to vindicate the rights of the government as a landed proprieter. But the evil of permitting persons who owned and controlled the alternate sections

to enclose the entire tract and thus to exclude or frighten off intending settlers finally became so great that Congress passed the Act of Feb. 25, 1885, forbidding all enclosures of public lands and authorizing abatement of fences."

See also Cameron vs. U. S. 148, U. S. 301.

It appears then that the evils at which Congress was aiming by the Act of Feb. 25, 1885, were those acts which prevented the entry and settlement of public lands by individuals and which interfered with the rights of the United States in the primary disposal of its soil. It was not the purpose of the United States government by that act to assert an exclusive police control over the public domain. In this connection it is said by the court in the above case of Camfield vs. United States:

"While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a state which it would have within a territory, we do not think the admission of a territory as a State deprives it of the power of legislating for the protection of the public lands though it may thereby involve the exercise of what is commonly known as the police power, *so long as such power is directed solely to its own protection.*" (Italics ours)

The last clause of the above quotation is the gist of the whole matter. The Act of Congress referred to was intended to protect the interests of the United States as a land owner and to prohibit those acts which interfered with the disposal of its lands to the persons and in the manner provided by law. It was certainly never intended to govern such cases as are affected by Sec. 6872 of our statute. The right to pasture livestock upon the public lands is not derived from any act of Congress relative to those lands. The owners of cattle and sheep who graze their flocks upon the public domain do so by sufferance of the owner of the paramount title, and so long as they do not interfere with the rights of the United States as a landed proprietor, or prevent or obstruct the disposal or settlement of those lands in the manner provided by Congress, the Federal Government suffers them to use the lands for grazing purposes; but it can hardly be argued that Congress intended by the Act of Feb. 25, 1885, to extend its police power over conflicts between stock growers in the exercise of their sufferance to pasture such lands. The practices prohibited by that Act were such as tended to nullify and to make ineffectual the laws relating to the settlement and disposal of the public lands.

Sec. 6872 neither in substance nor in effect grants to anyone nor pretends to grant to anyone either an exclusive right to any part of public domain or the authority to assert an exclusive right to any part of the same. Under that statute, lands used as a cattle range are fully open to entry and settlement, and the act in question does not obstruct or interfere with the rights either of the general government or of others who seek to acquire title by entry, settlement or purchase in the manner provided by law. Nor does the section prevent or interfere with the grazing of other stock upon a cattle range. The prohibition of the Idaho Statute is directed solely toward the grazing of sheep. Neither the spirit nor the letter of the Act of Congress of Feb. 25, 1885, is contravened.

The Idaho case of McGinnis vs. Friedman, 2 Idaho 393, cited in the brief of counsel for plaintiff in error, is authority merely for the proposition that a court of equity will not enjoin the commission of a naked criminal offense, where no property right is involved. That decision recognizes Sec. 6872, not as an act fixing property rights, but solely as a police measure.

The decisions rendered by the Courts with

reference to the police power of the State as exercised over range conflicts of this character postdate the Act of Congress above mentioned and in none of these decisions is it even intimated that that Act takes away from the States the right to regulate or to restrict the pasturing of the public domain. In the case of Bacon vs. Walker, supra, the Court had under consideration the validity of Sections 1217-1219 of the Revised Codes of Idaho, prohibiting under penalty the grazing of sheep upon the public lands within two miles on an inhabited dwelling, the Act being commonly referred to as the Two Mile Limit Law. In effect the law just referred to permits the owner of the dwelling to assert as against a sheep owner an exclusive right to that portion of the public range within two miles of his dwelling. If, therefore, the statute before the court is held void as being in contravention of the above Act of Congress, the Two Mile Limit Law is also void for the same reason.

II. THE ACT AND THE 14th AMENDMENT.

The objection that the statute is in conflict with the 14th amendment to the Federal Constitution may be answered by inquiring,

First: Does the statute, enacted professed-

ly to conserve a legitimate public interest, have a real or substantial relation to that object?

And, Second: Is it adapted to the end in view?

The wisdom or expediency of the policy manifested in this act, is, of course, a matter for legislative determination and is not a judicial question.

> Minneapolis & St Louis Railway Company vs. Beckwith, 129 U. S. 26, 29,
>
> Barbier vs. Connolly, 113 U. S. 27,
>
> Powell vs. Pennsylvania, 127 U. S. 678, 685, 32L. Ed. 253, 8 Sup. Ct. Rep. 992.
>
> Jacobson vs. Mass., 197 U. S. 11, 28, 49 L. Ed. 643, 25 Sup. Ct. Rep. 358.

A. THE EVILS SOUGHT TO BE REMEDIED

In 1875 the Legislature of Idaho passed an act prohibiting, under penalty, the grazing of sheep upon the public lands within two miles of the dwelling of a settler. This act, since commonly known as the Two Mile Limit Law, and herein referred to as such, is now embraced in Sections 1217-1219 of the Revised Codes of Idaho (1908).

In 1883 the act here in question was passed. It appears from these laws and from the decisions of the courts construing the same, that it has been the settled policy of the State for many years to maintain public order and promote the general prosperity and growth of the commonwealth through restrictions placed on the pasturing of sheep upon the public lands.

It is said in the case of Pike vs. State Board of Land Commissioners, 19 Idaho 268:

> "The public policy of the State is gathered from its history, the trend of its laws and the conduct and practice of its public officials, legislative, executive and judicial, in the administration, construction and execution thereof. As to the extent of that policy or its advantages and benefits to the State, the courts have nothing to do as against express legislation on a given subject."

In Sweet vs. Ballantyne, 8 Idaho 431, 69 Pacific Reporter, 995, the Idaho Supreme Court, in declaring the Two Mile Limit Law above mentioned a valid exercise of the police power of the State, says:

> "It is a matter of public history in this state that conflicts between sheep owners and cattle men and settlers were of frequent occurrence, resulting in violent breaches of the peace. It is also a matter of public history of the State that sheep are not only able

> to hold their own on the public range with other livestock but will in the end drive other livestock off the range, and that the herding of sheep upon certain territory is an appropriation of it almost as fully as if it was actually enclosed by fences, and this is especially true with reference to cattle."

In the same case, on rehearing, in 69 Pacific Reporter at Page 1001, it is stated:

> "The history of this State for the past twenty-five years shows that the encroachment of the sheep industry on that of the cattle industry has virtually driven the cattle industry, as it was conducted fifteen or twenty years years ago, out of the State; that frequent conflicts occurred between sheep and cattle men, resulting in serious breaches of the peace, in which many human lives have been lost."

In Bacon vs. Walker, 204 U. S. 311, 319, *supra*, this Court had under consideration the Idaho Act known as the Two Mile Limit Law, and in commenting upon the reasons for the enactment of the law, as expressed by the Idaho Supreme Court, says:

> "And the Court pointed out that it was not the purpose or effect of the statutes to make discriminations between sheep owners and owners of other kinds of stock, but to secure equality of enjoyment and use of the public domain to settlers and cattle owners with

sheep owners. To defeat the beneficent object of the statute, it was said, by holding their provision unconstitutional, would make of the lands of the State 'one immense sheep pasture'. And further: 'the owners of sheep do not permit them to roam at will, but they are under the immediate control of herders, who have shepherd dogs with them, and wherever they graze they take full possession of the range as effectually as if the lands were fenced. * * * It is a matter of common observation and experience that sheep eat the herbage closer to the ground than cattle or horses do, and their hoofs being sharp they devastate and kill the growing vegetation wherever they graze for any considerable time. In the language of one of the witnesses in this case: "Just as soon as a band of sheep passes over, everything disappears, the same as if fire had passed over it." It is part of the public history of this State that the industry of raising cattle has been largely destroyed by the encroachment of innumerable bands of sheep. Cattle will not graze, and will not thrive upon lands where sheep are grazed to any great extent.' These remarks require no addition. They exhibit the conditions which existed in the State, the cause and purpose of the statutes which are assailed and vindicate them from the accusation of being an arbitrary and unreasonable discrimination against the sheep industry."

The Idaho Supreme Court in the case of

State vs. Horn, wherein the statute before the Court was under consideration, states:

> "The clash between the sheep industry and the cattle industry, and between the sheep and farming industry, is a part of the history of this state; and the enforcement of certain police regulations has resulted in minimizing a conflict that was detrimental in the extreme to all three of these legitimate and necessary industries. The differences between these industries, while minimized. still exist in many portions of the State." (Record Pages 68, 69)

In the case now before the Court, the Idaho Supreme Court discusses the purpose of the statute in question in this language:

> "While it might be possible for sheep to graze upon a cattle range, it is well known to all stock growers that sheep and cattle will not range together, and that cattle and horses will not range on a sheep range. Thus legislation to protect sheep against cattle and horses is wholly unnecessary. * * * It is a matter of common knowledge that horses and cattle are left upon a cattle range receiving but little care and attention during the summer months by their owners; while sheep are constantly under the care of herders and dogs. * * * Sheep require much less water while grazing than cattle, and it therefore becomes necessary for cattle and horse owners to occupy portions of the public domain upon which there are streams

and springs of water to which their animals may have ready access.

The above are all very good reasons why it is imperative that the public domain within the jurisdiction of the State be properly regulated as between these two necessary and needful industries. Section 6872, Revised Codes, is a police regulation, and to our minds it clearly appears that it was the intention of the Legislature, in the enactment of said section, to preserve the tranquility of the citizens of the State; to avoid 'range wars,' and to promote the peace, quiet and general welfare of the citizens." Record Page 61.)

Inasmuch as Congress has made no attempt to control or to regulate the grazing of the public lands not embraced within national forests, and inasmuch as, through the result of immemorial custom, the public lands are resorted to as grazing grounds by the owners of all classes of livestock, the existence of conflicts and range quarrels giving rise to disturbances which mar the peace and order of the commonwealth is to be expected and is indeed inevitable. Leaving the parties to work out the solution of their own difficulties through the exercise of primitive methods creates a unique situation in a state where owners of property are otherwise invariably required to settle their controversies in the courts of

law. Under the existence of such conditions the only possible method of preserving order and upholding justice upon the range is found in the mutual forbearance of the parties, in the principle of "live and let live," and of "give and take." On an overcrowded range, however, the principle of mutual forbearance is speedily forgotten.

Cattle growers have long since learned that the habits, propensities and physical characteristics of sheep are such that these animals soon gain a decided ascendency over cattle in the struggle for the range. Cattle ordinarily run at large under only the general supervision of riders, whose efforts are restricted to keeping the stock upon some particular range. Sheep graze in flocks under the immediate care of herders and dogs. Whether at the command of their masters, or as a result of their own inclinations, these dogs invariably harass any cattle that may be found upon the same range with the flocks. The range is speedily and surely lost to the cattle. Self-preservation practically compels the cattle grower to resort to force and we thus have on the open range a situation always threatening to the public peace and frequently culminating in disorder and violence. These conditions of lawlessness

on the public range the State must deal with after they arise. It seems only proper that the State, in the exercise of its undoubted right to maintain the public peace, should take steps to eliminate, so far as possible, the underlying cause of these controversies, which consists in the invasion bv sheep of established cattle ranges.

Judge Cooley in his work on constitutional limitations (6th Edition) 704, states:

> "The police of a state, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offenses against the state, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with a like enjoyment of rights by others."

If considerations of public order and the preservation of important and legitimate industries necessary to the harmonious and symmetrical growth of the state, are interests of which the state may take cognizance, it would seem that the privileges of sheep owners must yield to the extent required by the statute before the court.

This court found nothing in the Idaho Statute prohibiting the grazing of sheep upon the public lands within two miles of the dwelling of a settler which would amount to class legislation or which would be obnoxious to the 14th Amendment as depriving citizens of property without due process of law. In the case of Bacon vs. Walker, *supra*, it was contended on behalf of the plaintiff in error:

First: That the sheep owner has an equal right with other citizens to pasture the public domain, and that by imposing a penalty upon him for exercising the right he is deprived of property without due process of law.

Second: That a discrimination was arbitrarily and unlawfully made by the statute between citizens engaged in grazing sheep upon the public domain, and citizens engaged in grazing other classes of livestock.

The Court held that neither contention was tenable. Conceding to plaintiff in error an equal right with other citizens to pasture upon the public domain, it was held that the State has an interest in the accommodation of those rights and that it may even have an interest above such accommodation. It was further held that the classification made by the statute

was not an arbitrary or objectionable classification.

Viewed in the light of arguments based on the 14th Amendment to the Constitution of the United States, it is difficult if not impossible to distinguish on principle between the statute before the Court and the act which this Court had under consideration in Bacon vs. Walker, supra.

The conditions, then, which appear to have prompted the Idaho Legislature to enact the law under consideration are such as seriously threaten the public peace and order, and interfere with the harmonious growth of the State.

In the case of C. B. & Q. Railway Company vs. Illinois, 200 U. S. 561-592, 26 Sup. Ct. Rep. 341, it is stated:

> "We hold that the police power of the state embraces regulations required to promote the public convenience or general prosperity as well as regulations designed to promote the public health, the public morals or the public safety, and the validity of the police regulation must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, or whether really designed to accomplish a legitimate public purpose."

See also Bacon vs. Walker, supra.
Barbier vs. Connolly, supra.

No sensible person would cite the production of sheep as a pernicious or non-useful calling. It is, of course, an industry that is in the highest degree useful and necessary. It is no new or recently discovered notion, however, that the industry if permitted to expand without check may, under certain conditions, become a menace to the well being of the commonwealth. Such condition evidently existed in England during the early part of the sixteenth century, judging from the opinion of writers at that time and from acts of Parliament. In the "Utopia" of Sir Thomas More, the author, in discussing the prevailing vice and wretchedness of the England of that day—1515—makes the following observations anent the unrestricted grazing of sheep:

"But yet this is not only the necessary cause of stealing. There is another, which, as I suppose, is proper and peculiar to you Englishmen alone. What is that, quoth the Cardinal? forsooth (quoth I) your sheep that were wont to be so meek and tame, and so small eaters, now, as I hear say, be become so great devourers and so wild, that they eat up, and swallow down the very men themselves. They consume, destroy, and devour whole fields, houses, and cities. For look in what parts of the realm doth grow the finest and therefore dearest wool, there noblemen and gentlemen, yea and certain abbots, holy men God wot not contenting

themselves with the yearly revenues and profits, that were wont to grow to their forefathers and predecessors of their lands, nor being content that they live in rest and pleasure nothing profiting, yea much annoying the weal public, leave no ground for tillage, they inclose all in pastures; they throw down houses; they pluck down towns and leave nothing standing, but only the church to make of it a sheep house. And as though you lost no small quantity of ground by forests, chases, lawns, and parks, those good holy men turn all dwelling-places and all glebeland into desolation and wilderness. Therefore that one covetous and insatiable cormorant and very plague of his native country may compass about and inclose many thousand acres of ground together within one pale or hedge, the husbandmen be thrust out of their own, or else either by cunning and fraud, or by violent oppression they be put besides it or by wrongs and injuries they be so wearied, that they be compelled to sell all: by one means therefore or by other, either by hook or crook they must needs depart away, poor, silly, wretched souls, men, women, husbands, wives, fatherless children, widows, woeful mothers, with their young babes, and their whole households small in substance and much in number, as husbandry requireth many hands. Away they trudge, I say, out of their known and accustomed houses, finding no places to rest in. All their household stuff, which is very little worth, though it might well abide the sale: yet being suddenly thrust out, they be constrained to sell it for a thing of nought. And when they, have wandering

about, soon spent that, what can they else do but steal, and then justly, God wot, be hanged, or else go about a begging."

This condition led to the passage in the reign of Henry VIII of the act of Parliament quoted in the opinion of Mr. Justice Budge in the case now before the court (Record, page 69).

B. SUITABILITY OF THE ACT TO THE END IN VIEW.

The statute in question does not amount to prohibition. It goes no further than is necessary to accomplish the end in view—the protection of a general public interest. The fact that several millions of sheep are today grazing on the public domain in Idaho, with no fear of prosecution under this act, is evidence that the restriction is not undue or arbitrary.

It is manifest that the evil could not be met without a subordination of one of the conflicting industries to the other. If the conflict was to cease, one industry must give way. It was necessarily within the discretion of the Legislature to determine which should be subordinated. The subordination actually brought about by the terms of the act is both just and reasonable. It is only on those ranges where the cattle owners have the superior

moral right, by virtue of priority of occupation, that the sheep owners are prohibited from grazing their flocks.

Similar regulations have been adopted in National Forest areas by the Forestry Service.

The Act creating the Forestry service gave to the Secretary of Agriculture authority to make such rules and regulations with reference to their occupancy and use as might seem necessary. (Act of June 4, 1897, 30 Stat. L. 35). Accordingly the Forestry Service has adopted a very complete system of rules and regulations on the subject of grazing within the reserves. The adoption of such grazing regulations supersedes all state legislation on the same subject within the reserves.

The rules of the Forestry Service with reference to grazing can be found in a pamphlet of the National Forest Manual issued by the Department of Agriculture, June 4, 1913. These rules are based upon the same principles as Sec. 6872 of the Idaho Revised Codes. Preference is given to persons in the prior use and occupancy of National Forest lands for grazing purposes and also to those who are local residents, owners of improved ranch property within or near the forest and dependent upon

the range. Cattle and sheep ranges are separated and sheep owners are prohibited, under penalty, from trespassing upon those ranges set apart for cattle and other livestock. It will be seen by an examination of these rules that the two underlying principles of the statute which is now before the court are the principles which underlie the rules of the Forestry Service:

First: That prior occupancy and usual and customary use of national forest lands give a preference right to secure the use of those lands for grazing purposes.

Second: Sheep are kept separate from other classes of stock.

C. DEFINITENESS AND CERTAINTY OF THE STATUTE.

Counsel for plaintiff in error urge that the statute is vague, indefinite and uncertain in that it is said to fail to define a cattle range and to provide no means of determining either the character of the range or the exterior boundaries thereof; and that it is arbitrary in that it is said to leave the determination of the facts to the arbitrary and *ex parte* action of the person claiming adversely to the sheep owner.

The problems which counsel discuss present little practical difficulty unless we choose to ignore the actual methods pursued in Idaho in the grazing of livestock upon the range and to disregard the language of the act itself.

Reference is made to the prohibition against grazing sheep upon any range usually occupied by cattle either as a spring, summer or winter range. As is well known, the period during which any particular portion of the range may be pastured to advantage is determined in large measure, if not entirely, by altitude and climatic conditions. These conditions operate equally on all classes of livestock. The higher regions where the snow lies deep in winter are accessible only during the summer months, and the arid soil of the lower districts furnish little sustenance for stock except during the winter and spring seasons.

Cattle range over the same districts year after year. In addition to the natural habit of such class of livestock to remain in the locality to which they are accustomed, they are confined to rather well defined areas by means of riding and salting, and sometimes, as in the case before the court, by natural barriers. (Record Page 33).

In the ranging of sheep it is the business of the camp tender to investigate range condition, locate the camp and direct the herder where to pasture his flock. Camp tenders are generally selected for their knowledge of conditions and their fitness for the performance of these duties. Thus the various localities where cattle and sheep are habitually ranged or pastured, and the conditions surrounding the two industries are familiar subjects to those in charge of the sheep.

As is stated by the Idaho Court in the case at bar:

> "A 'cattle range' in this State has a well defined meaning and so has a 'sheep range'; this meaning is fully recognized by persons engaged in the two industries. * * * It is also well known to stock growers that cattle and horses have their accustomed range, to which they go if permitted, of their own volition and upon which they range, and where they can be found by the owners.
>
> It is a matter of common knowledge that horses and cattle are left upon a cattle range receiving but little care and attention during the summer months by their owners, while sheep are constantly under the care of herders and dogs; moreover that a camp tender is employed in connection with the care and herding of sheep, among whose duties is the riding of the range for the purpose of locating a suitable area upon which to drive,

herd and graze the sheep of his employer. Sheep require much less water while grazing than cattle and it therefore becomes necessary for cattle and horse owners to occupy portions of the public domain upon which there are springs and streams of water to which their animals may have ready access." (Record P. 61)

With regard to the interpretation of the statute itself, it is a well established principle that every word and clause should, if possible, have assigned to it a meaning, leaving no useless words. The interpretation should lean strongly to avoid absurd consequences.

Bishop on Stat. Cr. (3rd Ed.) Pr. 82, citing many cases.

The statute prohibits the grazing of sheep upon a range usually occupied by cattle. The word "occupy" is defined by Webster as meaning, "to possess," "to tenant," "to take up, or have place in, the extent, room, space; to fill; to take or use up; to possess or use the time or capacity of; to employ; to busy."

The word "usual" is defined by Webster as meaning "such as is in common use; such as occurs in ordinary practice, or in the ordinary course of events; customary; ordinary; habitual; common".

This Court will consider the construction

placed upon the statute of a state by the court of last resort in that state, as a correct construction and determine whether or not that statute, so construed, is prohibited by any provision of the Federal Constitution. What may seem to be a defect in a state statute may be cured by the construction given to the words by the Court having final authority to declare their intent.

> International Harvester Company vs. Ky., 234 U. S. 216, 220, 58 L. Ed. 1284, 34 Sup. Ct. Rep. 853.

In construing this act the Supreme Court of Idaho in the case now before this Court, states:

> "The appellant insists in his argument that Section 6872, Revised Codes, is void because it fails to describe the exterior limits of a cattle range, and for that reason it is impossible for a citizen herding sheep to determine when he has crossed the exterior limits of a cattle range. The statute says: 'The priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range.'
>
> "Priority of possession, or priority of right, or the first in time is the first in right, are all common, ordinary, everyday expressions, and have a well defined meaning. The priority of right to the use of the range as between cattle and sheep owners depends

upon the prior use in the usual and customary manner. Thus, if the range is used by cattle owners, and has been so constantly used prior to its use by sheep owners, the right to the use is established by proof of such priority. * * * These, being questions of fact, are for the jury to determine the same as would be the questions of fact, in any other ordinary criminal prosecution. The intention to commit the act, as well as the commission of the act, are necessary and essential ingredients of the crime. * * * We think we have disposed of the question that a cattle grower can arbitrarily fix the limits or boundaries of the range. Both the limits and boundaries of the range are determined by priority of possession and use of the range by the cattle grower in the usual and customary use of the cattle range and are questions of fact for the jury. The cattle grower can neither enlarge nor diminish the area at will, but must establish by competent evidence and beyond a reasonable doubt that the defendant in charge of the sheep wilfully and unlawfully herded, grazed or pastured them upon a cattle range, as heretofore defined. That said range had been previously occupied by cattle, or was occupied by cattle growers either as a spring, summer or winter range for their cattle, and that they, or their predecessors in the cattle business, had made the usual and customary use of such area of country as a cattle range, prior to any use thereof, in the usual and customary manner, as a sheep range, and that said range had not been abandoned as a cattle range. * * * The character and area of a cattle range are to be determined

by its priority of use in the usual and customary manner as such." (Record Pages 62-63).

In the case of Adams vs. Lansdon, 18 Idaho, 483, the Court says:

> "Laws are enacted to be read and obeyed by the people and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey and uphold them."

In the case of State vs. Stuth, 39 Pac. 665, decided by the Supreme Court of Washington, a penal statute providing that every person who disturbs any religious society, when meeting together in public worship, shall be fined, was attacked on the ground that it was invalid for uncertainty in that it failed sufficiently to define the crime. It was held that the statute was not uncertain, the words "disturb" and "religious society" being used in their ordinary sense.

See also Dekelt vs. People. 99 Pac. 330—Colorado.

In State of Idaho vs. Butterfield, reported in 165 Pac. 218. cited in the brief of cousel, the Idaho Court had this statute under considera-

tion. While there is some loose language used in the opinion in that case, it is evident from a careful reading that the Court merely held that the jury should be instructed that they may take into consideration, on the question of abandonment, the grazing of sheep on an alleged cattle range for a period of years, and the failure of the cattle growers to protest against such use.

Notwithstanding that the language of the act, taken in connection with its interpretation by the Idaho Court, is apt and clear, counsel urge that it is void because it contains in its definition elements creating problems which the sheepman must solve at the risk of being treated as a criminal if his honest judgment does not coincide with the subsequent judgment of a jury.

Must a penal statute enacted as a police measure be so definite and certain in its terms as to require no exercise of individual judgment in determining whether the circumstances attendant upon a contemplated act are of such a nature as to render the action unlawful, if undertaken? Must all the elements which constitute the offense be so certainly defined as to make it impossible for the prudent individual to mistake his rights, as those rights are

estimated by a jury? Manifestly not. If such were the case, legislation prohibiting under penalty contracts and combinations in unreasonable restraint of trade, and much other legislation that will occur to the minds of the Court, would be void for uncertainty.

It must be remembered that the individual accused of a violation of this act is not charged with the knowledge of facts concerning which he has no knowledge and no adequate information which might impute knowledge to him. He is not required, as counsel seem to think, to ascertain the facts at all hazards. The extreme hazards of the sheepman which counsel dwell upon with such anxious concern are not in reality required to be undertaken. As stated by the Supreme Court of Idaho in the opinion rendered in this action:

> "This statute must necessarily be construed with, and as a part of, Section 6314 of the Revised Codes, which latter section provides:
>
> 'In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence.'
>
> "In other words, there must be an intent to violate said section 6872, supra, as well as the act of driving or herding sheep upon a

cattle range, or the failure upon the part of the defendant by the exercise of ordinary diligence to ascertain whether or not the range upon which he drives, herds, and grazes his sheep is a cattle range within the meaning of said section. * * * Where the owner of sheep knows, or by the exercise of ordinary care is able to ascertain, that a certain given area of the public domain has been used and is then being used as a cattle range, and he wilfully and knowingly herds, drives, and grazes his sheep upon such cattle range, it then becomes his wilful and unlawful act of trespass and he is clearly amenable to the statute. * * * The cattle grower * * * must establish by competent evidence and beyond a reasonable doubt that the defendant in charge of the sheep wilfully and unlawfully herded, grazed, or pastured them upon a cattle range * * * and that the defendant knew, or had information from which a resonable man under like circumstances would have known, that he was herding, grazing, or pasturing sheep upon a cattle range previouly occupied by cattle in the usual and customary use of such range." (Record, pages 62-63.)

The sheepman is of course, charged with knowledge of the law, and may in some cases conceivably be under the necessity of using his judgment and intelligence in the application of the law to the facts in hand. That he may be assuming some risk in acting upon the conclusion reached is no more true here than it is in the case of many other acts of a similar

character and of established validity. In any case he is clearly not amenable to the statute unless he knew, or was in the possession of information from which a reasonable man under like circumstances would have known, that his sheep were being grazed upon a range customarily occupied by cattle, and this knowledge or information the prosecution must bring home to him by competent evidence and beyond a reasonable doubt. Thus the dangers and hazards which harry the mind of counsel are eliminated in so far as a knowledge of the facts is concerned. We submit that it is only a fair statement to say that, with the facts before him and the language of the statute and the interpretation given it by the Supreme Court in his recollection, the sheepman can determine with reasonable certainty in any given case whether it is lawful or unlawful to graze sheep upon any given area.

In support of their contention that the Statute is void for uncertainty counsel cite and quote at length from Louisville & Nashville Railway Company vs. Commonwealth, 99 Ky. 132, Louisville Railway Company vs. Railroad Commission, 19 Fed. 679, Virginia, etc. Com-

pany vs. Dey, 35 Fed. 866, and Tozer vs. U. S. 52 Fed. 917.

While these decisions may not subsequently have been wholly disregarded, they were at any rate "cited in vain" in Waters-Pierce Oil Company vs. Texas, 212 U. S. 86, 109, 53 L. Ed. 417, 29 Sup. Ct. Rep. 220.

In Nash vs. U. S., 229 U. S., 373, 377, 57 L. Ed. 1232, 33 Sup. Ct. Rep. 780, wherein the Sherman Anti-Trust Act, as construed in the Standard Oil and American Tobacco Company cases was attacked as being so vague as to be inoperative on its criminal side, Mr. Justice Holmes, speaking for this Court, says:

> "The law is full of instances where a man's fate depends upon his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

Many illustrations and cases are cited.

Again in International Harvester Company vs. Kentucky, 234 U. S. 216,223, 58 L. Ed. 1284, 34 Sup. Ct. Rep. 853, while the act there under consideration was held invalid for uncertainty, it was stated:

"We regard this decision as consistent with Nash vs. U. S., 229 U. S. 373, 377, in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree,—what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts. It goes no farther than to recognize that, as with negligence, between the two extremes of the obviousy illegal and the plainly lawful there is a gradual approach, and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human and a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe."

See also Fox vs. Washington, 236 U. S. 273, 59 L. Ed. 573, 35 Sup. Ct. Rep. 383.

In the case before the Court the facts which determine the criminality of the act are not only in existence but they must be shown to have been within the knowledge of the defendant, or so readily accessible as to render only ordinary diligence on his part necessary to acquire them. It must be remembered that the power of the State in dealing with the pasturing of the public lands is limited to those matters of general public concern, as distinguished

from those of a private nature. This fact, taken in connection with the varied conditions surrounding the use of the public range, made it impossible to draw a line in advance without an artificial simplification that would not only be unjust but arbitrary and unreasonable as well. The form of the act indicates that the Legislature, while seeking to minimize conflicts by assuring a certain measure of equality in range privileges, nevertheless endeavored to preserve the full use of the range by framing a statute that would be responsive to varied and changing conditions.

In conclusion it is submitted that Section 6872 of the Idaho Revised Codes is not void for any of the reasons that have been urged against it.

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WILLIAM HEALY,
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OMAECHEVARRIA *v.* STATE OF IDAHO.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 102. Argued December 20, 1917.—Decided March 18, 1918.

A law of Idaho (Rev. Codes, 1908, § 6872), applicable to the public domain, provides that any person having charge of sheep who allows them to graze on any range previously occupied by cattle, is guilty of a misdemeanor, and that priority of possessory right between cattle and sheep owners to any range is to be determined by the priority in the usual and customary use of it, as a cattle or sheep range. Experience, inducing this and similar laws, had, says the Supreme Court of the State, shown that use of a range by sheep unfits it for cattle, but not *vice versa;* and that segregation is essential to protect the cattle industry and prevent serious breaches of the peace between cattlemen and sheepmen.

Held: (1) That the police power of the State extends over the federal public domain, at least where there is no legislation by Congress on the subject.

(2) That in segregating sheep from cattle the Idaho law was primarily designed to preserve the peace, and is not an unreasonable or arbitrary exercise of the police power.

(3) That it does not discriminate arbitrarily and deny equal protection in giving preference to cattle owners in prior occupancy without giving a like preference to sheep owners in prior occupancy.

(4) That, as a criminal law, it is not wanting in due process, in failing to provide for the ascertainment of the boundaries of a "range" and for determining what length of time is necessary to constitute a prior occupation a "usual" one within its meaning.

(5) That it is not in conflict with the clause in § 1 of the "act to prevent unlawful occupancy of the public lands," c. 149, 23 Stat. 321, which prohibits the assertion of a right to the exclusive use and occupancy of any part of the public lands without claim or color of title made or acquired in good faith, etc., since that clause, as is shown by an examination of the entire act and its history, prohibits merely the assertion of an exclusive right to use or occupation by force, intimidation, or by what would be equivalent in effect to an enclosure, whereas the state statute makes no grant, and, in so far as this exclusion of sheep from certain ranges approaches a grant,

the result is incidental only, and it operates in favor of horse owners as well as cattle owners.

(6) That the exclusion of sheep owners under certain circumstances does not interfere with any rights of a citizen of the United States, Congress not having conferred on citizens the right to graze stock on the public lands, their use for that purpose being merely by sufferance.

27 Idaho, 797, affirmed.

THE case is stated in the opinion.

Mr. Frank P. Prichard and *Mr. Shad L. Hodgin* for plaintiff in error.

Mr. T. A. Walters, Attorney General of the State of Idaho, and *Mr. William Healy* for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

For more than forty years the raising of cattle and sheep have been important industries in Idaho. The stock feeds in part by grazing on the public domain of the United States. This is done with the Government's acquiescence, without the payment of compensation, and without federal regulation. *Buford* v. *Houtz*, 133 U. S. 320, 326. Experience has demonstrated, says the state court, that in arid and semi-arid regions cattle will not graze, nor can they thrive, on ranges where sheep are allowed to graze extensively; that the encroachment of sheep upon ranges previously occupied by cattle results in driving out the cattle and destroying or greatly impairing the industry; and that this conflict of interests led to frequent and serious breaches of the peace and the loss of many lives.[1] Efficient policing of the ranges is

[1] *Sweet* v. *Ballentyne*, 8 Idaho, 431, 447; *Pyramid Land & Stock Co.* v. *Pierce*, 30 Nevada, 237, 253-255. Report of National Conservation Commission, 1909, vol. III (60th Cong., 2nd sess., Senate Doc. No. 676), p. 357. Conference of Governors (1908), p. 143.

impossible; for the State is sparsely settled and the public domain is extensive, comprising still more than one-fourth of the land surface.[1] To avert clashes between sheep herdsmen and the farmers who customarily allowed their few cattle to graze on the public domain near their dwellings, the territorial legislature passed in 1875 the so-called "Two Mile Limit Law." It was enacted first as a local statute applicable to three counties, but was extended in 1879 and again in 1883 to additional counties, and was made a general law in 1887.[2] After the admission of Idaho to the Union, the statute was reenacted and its validity sustained by this court in *Bacon v. Walker*, 204 U. S. 311. To avert clashes between the sheep herdsmen and the cattle rangers, further legislation was found necessary; and in 1883 the law (now § 6872 of the Revised Codes,) was enacted which prohibits any person having charge of sheep from allowing them to graze on a range previously occupied by cattle.[3] For

[1] The land area of Idaho is approximately 53,346,560 acres [U. S. Census (1910), vol. VI, p. 401], of which 20,000,000 acres were specifically classified as grazing lands. Report of Secretary of Interior (1890), vol. I, p. XCI. In 1883 about 50,000,000 acres still formed a part of the public domain. "The Public Domain," by Thomas Donaldson (1884), pp. 528, 529, 1190. On July 1, 1914, there were still unappropriated and unreserved 16,342,781 acres. Report of Department of Interior (1914), vol. I, p. 207. The population of Idaho in 1880 was 32,610; in 1910 it was 325,594.

[2] Acts of January 14, 1875; February 13, 1879; January 31, 1883; Revised Statutes, 1887, § 1210 *et seq.* The first session of the territorial legislature convened December 7, 1863. Idaho was admitted to the Union July 3, 1890.

[3] Revised Codes of Idaho, 1908, § 6872:

"Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to

violating this statute the plaintiff in error, a sheep herdsman, was convicted in the local police court and sentenced to pay a fine. The judgment was affirmed by an intermediate appellate court and also by the Supreme Court of Idaho. 27 Idaho, 797. On writ of error from this court the validity of the statute is assailed on the ground that the statute is inconsistent both with the Fourteenth Amendment and with the Act of Congress of February 25, 1885, c. 149, 23 Stat. 321, entitled, "An act to prevent unlawful occupancy of the public lands."

First: It is urged that the statute denies rights guaranteed by the Fourteenth Amendment, namely: Privileges of citizens of the United States, in so far as it prohibits the use of the public lands by sheep owners; and equal protection of the laws, in that it gives to cattle owners a preference over sheep owners. These contentions are, in substance, the same as those made in respect to the "Two Mile Limit Law," in *Bacon* v. *Walker*, *supra;* and the answer made there is applicable here. The police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject.[1] We cannot say that the measure adopted

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any range is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

[1] The advisability of regulation by some system of leasing or licensing has been repeatedly recommended to Congress, and bills to that end have been introduced, but none has been enacted. Report of Department of Interior (1902), vol. I, pp. 167–175. Cong. Rec. vol. 35 (1901–1902), pp. 291, 1048. Report of Public Lands Commission, Senate Doc. (1905), 58th Cong., 3rd sess., No. 189, pp. XX–XXIII, 5–61. Cong. Rec., vol. 40 (1905–1906), pp. 54, 1164. Letter from the Acting Secretary of Interior, House Doc. No. 661 (March, 1906). Report of Department of Interior (1907), vol. I, pp. 78–81. Cong. Rec., vol. 42 (1907–1908), p. 14. Report of Department of Interior (1908), vol. I, p. 15. Action of the American National Live Stock Association relative to the Disposition of the Unappropriated Public Lands of the United States (1908). Report of Department of Interior (1911),

by the State is unreasonable or arbitrary. It was found that conflicts between cattle rangers and sheep herders on the public domain could be reconciled only by segregation. In national forests, where the use of land is regulated by the Federal Government, the plan of segregation is widely adopted.[1] And it is not an arbitrary discrimination to give preference to cattle owners in prior occupancy without providing for a like preference to sheep owners in prior occupancy.[2] For experience shows that sheep do not require protection against encroachment by cattle, and that cattle rangers are not likely to encroach upon ranges previously occupied by sheep herders. The propriety of treating sheep differ-

vol. I, p. 9. Cong. Rec., vol. 48 (1911–1912), p. 69. Hearings before the House Committee on Public Lands on H. R. Bill 19857 (1912). Report of Department of Interior (1912), vol. I, p. 5. Cong. Rec., vol. 50 (1913), p. 2365; vol. 51 (1913–1914), pp. 939, 3814. Report of Department of Agriculture (1914), pp. 8–10. Hearing before a subcommittee of the House Committee on Public Lands on H. R. 9582, February 12, 1914, pp. 7–8. "Practical Application of the Kent Grazing Bill to Western & Southwestern Grazing Ranges," address by J. J. Thornber before the American National Live Stock Association, Denver, Colo., January 22, 1914. Report of Department of Agriculture (1915), p. 47. Cong. Rec., vol. 53 (1915–1916), p. 21. Report of Department of Agriculture (1916), pp. 18–19.

[1] National Forest Manual (1913), pp. 13, 28. Hearing before House Committee on H. R. 9582 and H. R. 10539, on Grazing on Public Lands (1914), p. 73. Grazing in Forest Reserves, by F. Roth, Yearbook of Department of Agriculture (1901), pp. 333, 338, 343. Grazing of Live Stock on Forest Reserves, by Gifford Pinchot, Report National Live Stock Association (1902), pp. 274, 275.

[2] In the prolonged discussion of the proposal to correct the abuses of "open range" by leasing government grazing lands, the propriety of safeguarding "rights" as determined by priority of occupancy and use has been generally insisted upon. See Conference of Governors (1908), p. 347; Report of Department of Interior (1902), p. 174; Report of Public Lands Commission, Senate Doc. (1905), 58th Cong., 3rd sess., No. 189, pp. 14, 60 (par. 13); National Forest Manual, June 4, 1913, pp. 53, 58.

ently than cattle has been generally recognized.[1] That the interest of the sheep owners of Idaho received due consideration is indicated by the fact that in 1902 they opposed the abolition by the Government of the free ranges.[2]

Second: It is also urged that the Idaho statute, being a criminal one, is so indefinite in its terms as to violate the guarantee by the Fourteenth Amendment of due process of law, since it fails to provide for the ascertainment of the boundaries of a "range" or for determining what length of time is necessary to constitute a prior occupation a "usual" one within the meaning of the act. Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other States.[3] This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. *Nash* v. *United States*, 229 U. S. 373, 377; *Miller* v. *Strahl*, 239 U. S. 426, 434. Furthermore, any danger to sheepmen which might otherwise arise from indefiniteness, is removed by § 6314 of Revised Codes, which provides that: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence."

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[1] Reports of the Department of Interior (1898), vol. I, p. 87; (1899), vol. I, pp. XX, 105–112; (1900), vol. I, p. 390; (1901), vol. I, p. 127. Utah (1853), Laws 1851–1870, c. 60, p. 90; Washington, Laws 1907, p. 78; Arizona, Penal Code, 1913, § 641. See statutes cited, *infra*, in note 1, p. 352.

[2] Hearings before House Committee on Public Lands on Leasing Grazing Lands (1902), 57th Cong., 1st Sess., pp. 76–77.

[3] Montana, "Laws" 1871–1872, p. 287, § 87, makes it a crime to drive stock from a "range" on which they "usually" run. North Dakota, "Laws," 1891, p. 123, deals with "customary range"; Arizona, Penal Code, 1913, § 637, with "range"; Colorado, Courtright's Statutes, § 6375, with "usual range"; Texas, Penal Code Annotated, 1916, Art. 1356 (1866), with "accustomed range."

Third: It is further contended that the statute is in direct conflict with the Act of Congress of February 25, 1885.[1] That statute which was designed to prevent the

[1] "An act to prevent unlawful occupancy of the public lands.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land-office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited.

"Sec. 2. That it shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States that section one of this act is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by Governmental sub-divisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district or circuit court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also hereby conferred on any United States district or circuit court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or em-

illegal fencing of public lands, contains at the close of § 1 the following clause with which the Idaho statute is said to conflict: "and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United

ployee having charge or control of the inclosure; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court.

"Sec. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: *Provided*, This section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.

"Sec. 4. That any person violating any of the provisions hereof, whether as owner, part owner, or agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor and fined in a sum not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, for each offense. [As amended by Act of March 10, 1908, c. 75, 35 Stat. 40.]

"Sec. 5. That the President is hereby authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of said lands, and to employ civil or military force as may be necessary for that purpose.

"Sec. 6. That where the alleged unlawful inclosure includes less than one hundred and sixty acres of land, no suit shall be brought under the provisions of this act without authority from the Secretary of the Interior.

"Sec. 7. That nothing herein shall affect any pending suits to work their discontinuance, but as to them hereafter they shall be prosecuted and determined under the provisions of this act.

"Approved, February 25th, 1885."

States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited."

An examination of the federal act in its entirety makes it clear that what the clause quoted from § 1 sought to prohibit was merely the assertion of an exclusive right to use or occupation by force or intimidation or by what would be equivalent in effect to an enclosure. That this was the intent of Congress is confirmed by the history of the act. The reports of the Secretary of the Interior upon whose recommendation the act was introduced, the reports of the committees of Congress, and the debates thereon indicate that this alone was the evil sought to be remedied,[1] and to such action only does its prohibition appear to have been applied in practice.[2] Although Idaho had, by statute, excluded sheep from portions of the public domain since 1875—no reference to the fact has been found in the discussion which preceded and followed the enactment of the federal law, nor does any reference seem to have been made to the legislation of other States which likewise excluded sheep, under certain circumstances, from parts of the public do-

[1] Reports of Department of Interior (1882), vol. I, p. 13; (1883), vol. I, pp. XXXII, 30, 210; (1884), vol. I, pp. XVII, 17; (1885), vol. I, p. 205. Letter of Secretary of Interior (1884), Senate Ex. Doc. (1883–1884), No. 127. Report of House Committee, 48th Cong., 1st sess. (1884), No. 1325; Report of Senate Committee, 48th Cong., 2nd sess. (1885), No. 979. Cong. Rec., vol. 15 (1883–1884), pp. 4768–4783; vol. 16 (1884–1885), p. 1457.

[2] *United States* v. *Brandestein*, 32 Fed. Rep. 738, 741; Reports of Department of Interior (1885), vol. I, p. 44; (1886), vol. I, pp. 30–41; (1887), vol. I, pp. 12–13; (1888), vol. I, p. XVI; (1901), vol. I, p. 92; (1902), vol. I, pp. 11, 172–173, 306; (1903), vol. I, pp. 18–19; (1904), vol. I, pp. 20, 367; (1905), vol. I, p. 20; (1908), vol. I, p. 15; (1915), vol. I, p. 226.

Compiled Statutes, §§ 4997–5002, notes.

main.[1] And no case has been found in which it was even urged that these state statutes were in conflict with this act of Congress.

The Idaho statute makes no attempt to grant a right to use public lands. *McGinnis* v. *Friedman*, 2 Idaho, 393. The State, acting in the exercise of its police power, merely excludes sheep from certain ranges under certain circumstances. Like the forcible entry and detainer act of Washington, which was held in *Denee* v. *Ankeny*, *ante*, 208, not to conflict with the homestead laws, the Idaho statute was enacted primarily to prevent breaches of the peace. The incidental protection which it thereby affords to cattle owners does not purport to secure to any of them, or to cattle owners collectively, "the exclusive use and occupancy of any part of the public lands." For every range from which sheep are excluded remains open not only to *all* cattle, but also to horses, of which there are many in Idaho.[2] This exclusion of sheep owners under certain circumstances does not interfere with any rights of a citizen of the United States. Congress has not conferred upon citizens the right to graze stock upon the public lands. The Government has merely suffered the lands to be so used. *Buford* v. *Houtz*, *supra*. It is because the citizen possesses no such right that it was held by this court that the Secretary of Agriculture might, in the exercise of his general power to regulate forest reserves, exclude sheep and cattle therefrom. *United States* v. *Grimaud*, 220 U. S. 506; *Light* v. *United States*, 220 U. S. 523.

[1] Statutes resembling the Idaho "Two Mile Limit Law" have been passed in a number of the western States. Arizona, Act of February 12, 1875, Compiled Laws, 1864–1877, p. 561; Penal Code of Arizona, 1913, § 639; Colorado, Courtright's Statutes, § 6377 (1877); Nevada, Revised Laws, 1912, § 2317 (1901), § 2319 (1907); California, Statutes, 1869–1870, p. 304.

[2] Compare U. S. Census (1910), vol. VI, p. 390; Report, Department of Agriculture (1914), p. 148.

343. Syllabus.

All the objections urged against the validity of the statute are unsound. The judgment of the Supreme Court of Idaho is

Affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent.